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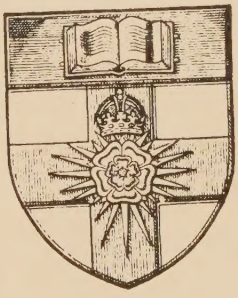

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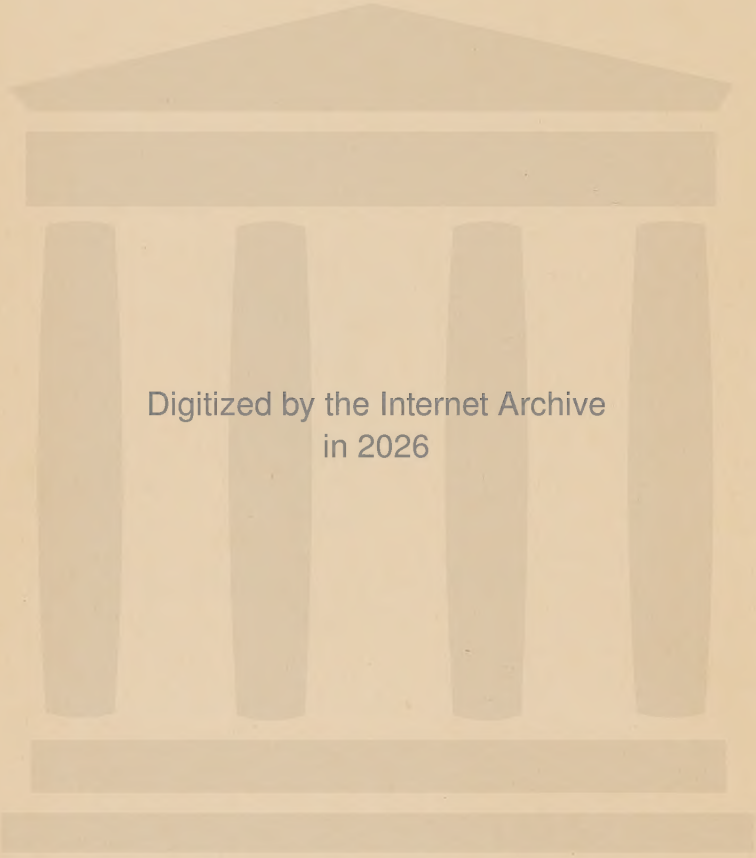
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THE

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AND

PEERAGE CASES.

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1916.

June 27. THE RIGHT HONOURABLE SIR JAMES STIRLING, *late a Lord Justice of Appeal, died at his residence, Finchcocks, Goudhurst, Kent, at the age of* 80.

July 3. THE RIGHT HONOURABLE RUFUS DANIEL, BARON READING, G.C.B., K.C.V.O., *was created a Viscount by the style of Viscount Reading, of Erleigh in the County of Berks.*

Oct. 16. THE RIGHT HONOURABLE SIR WALTER GEORGE FRANK PHILLIMORE, BART., *having resigned his office as a Lord Justice of Appeal,* SIR THOMAS EDWARD SCRUTTON, *one of the Justices of the High Court, was appointed a Lord Justice of Appeal, and was afterwards sworn of the Privy Council and took his place at the Board accordingly.*

Oct. 16. HENRY ALFRED MCCARDIE, ESQUIRE, *was appointed one of the Justices of the High Court of Justice. He was afterwards knighted.*

Dec. 8. THE RIGHT HONOURABLE SIR ROLAND LOMAX BOWDLER VAUGHAN WILLIAMS, *late a Lord Justice of Appeal, died at his residence, Ashes Farm, Abinger, Dorking, at the age of* 78.

Dec. 11. THE RIGHT HONOURABLE BARON BUCKMASTER OF CHEDDINGTON *having resigned his office as Lord Chancellor of Great Britain, the Great Seal was on this day delivered to* THE RIGHT HONOURABLE SIR ROBERT BANNATYNE FINLAY, G.C.M.G., K.C.

Dec. 11. GORDON HEWART, ESQUIRE, K.C., *was appointed Solicitor-General in place of* THE RIGHT HONOURABLE SIR GEORGE CAVE, K.C., *who became Secretary of State for the Home Department.*

Dec. 19. THE RIGHT HONOURABLE SIR ROBERT BANNATYNE FINLAY, G.C.M.G., K.C., *was created a Baron by the style of Baron Finlay, of Nairn, in the County of Nairn.*

ERRATA.

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LIST

OF THE

JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HIS MAJESTY IN COUNCIL.

1916.

Lord *Buckmaster*, Lord Chancellor.
Sir *Robert B. Finlay*, Lord Chancellor.
Earl of *Halsbury*.
Earl *Loreburn*.
Viscount *Haldane*.
Lord *Dunedin*.
Lord *Atkinson*.
Lord *Shaw*.
Lord *Mersey*.
Lord *Moulton*.
Lord *Parker of Waddington*.
Lord *Sumner*.
Lord *Parmoor*.
Lord *Wrenbury*.
Sir *Samuel Griffith*, G.C.M.G.
Sir *Edmund Barton*, G.C.M.G.
Sir *John Edge*.
Sir *Charles Fitzpatrick*, G.C.M.G.
Syed *Ameer Ali*, C.I.E.
Sir *Arthur Channell*.
Sir *James Rose-Innes*, K.C.M.G.
Sir *Lawrence Jenkins*, K.C.I.E.

And those other members of the Privy Council who are within the provisions of the statutes 3 *&* 4 *Will.* 4, *c.* 41, 44 *Vict. c.* 3, *and* 50 *&* 51 *Vict. c.* 70.

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

GLASGOW COAL COMPANY, LIMITED . APPELLANTS; H. L. (Sc)*

AND 1916

WELSH . . . . . RESPONDENT. *March* 6.

Workmen's Compensation—Miner—"Accident"—Miner baling out Water—Rheumatism caused by exceptional Exposure to Cold and Damp—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A man employed as a brusher in a mine was directed by the mine owners to bale out a large quantity of water which had accumulated at the pit's bottom owing to the breakdown of a pump which had occurred five days earlier. He was engaged in this work, which necessitated his standing up to his chest in water, for eight hours, with the result that he contracted sub-acute rheumatism. Upon a claim for compensation under the Workmen's Compensation Act, 1906, the arbitrator found that the rheumatism

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* *Present:* VISCOUNT HALDANE, LORD KINNEAR, LORD SHAW OF DUNFERMLINE, LORD PARMOOR, and LORD WRENBURY.

H. L. (Sc.)
1916
GLASGOW COAL COMPANY, LIMITED v. WELSH.

was caused by the extreme and exceptional exposure to cold and damp to which the man was subjected on the occasion in question and awarded him compensation:—

Held, that the injury was sustained by accident within the meaning of the Act.

Decision of the Second Division of the Court of Session in Scotland, 1915 S. C. 1020, affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland (1) upon a case stated by the sheriff-substitute of Lanarkshire under the Workmen's Compensation Act, 1906.

The material facts found by the case were as follows:—

On October 23, 1914, the respondent was working in the appellants' employment as a brusher at their Newton Pit, Kenmuirhill Colliery, and on that date the water pump in the colliery broke down and a large quantity of water accumulated in the pit bottom, in consequence of which work in the pit was suspended. On October 28, 1914, at about 10 P.M. the respondent was directed to go down the pit, and went down in the belief that he was going to do his ordinary work as a brusher. When he got down the pit he was directed to bale the water therefrom. In order to do so it was necessary for the respondent to stand up to his chest, and he did stand up to his chest, in water; and he was engaged in this work for eight hours. The respondent thereafter, and for two or three days, felt great stiffness and cold and pains in his joints, but continued to work until the morning of November 2, 1914, when he started to go to his work, but had to turn back owing to his physical condition. On November 3 he consulted a doctor, and was found by him to be suffering from sub-acute rheumatism and unfit for work. He continued in this condition from November 2, 1914, until January 25, 1915. From January 26 until March 2, 1915, he was able to work at reduced wages, and since March 2, 1915, his incapacity for work had ceased. The rheumatism from which the respondent suffered was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question.

The sheriff-substitute found in law that this was an injury caused

(1) 1915 S. C. 1020.

by accident arising out of and in the course of the respondent's employment with the appellants and awarded him compensation.

The question of law for the opinion of the Court was, Was there evidence upon which it could be competently found that the incapacity of the respondent was attributable to accident arising out of and in the course of his employment with the appellants?

The Second Division (the Lord Justice-Clerk, Lord Johnston, and Lord Guthrie) answered this question in the affirmative and affirmed the determination of the sheriff-substitute.

1916. Jan. 20. *Hon. William Watson, K.C.* (of the Scottish Bar), and *Colin Smith* (for *Harold W. Beveridge*, serving with His Majesty's Forces), for the appellants. The appellants admit that the injuries sustained by the respondent arose out of and in the course of his employment, but they contend that the facts disclosed by the arbitrator cannot be reasonably held to be an accident within the meaning of the Act. To constitute an accident there must be an untoward or unlooked for event, whether external or subjective, which can be referred to as the cause of the injury. In every one of the authorities there is to be found some definite occurrence to which the injury is attributable: *Stewart* v. *Wilsons and Clyde Coal Co.* (1); *Fenton* v. *Thorley & Co.* (2); *Broderick* v. *London County Council* (3); *Brintons* v. *Turvey* (4); *Steel* v. *Cammell, Laird & Co.* (5); *Ismay, Imrie & Co.* v. *Williamson* (6); *Coe* v. *Fife Coal Co.* (7); *Sheerin* v. *Clayton & Co.* (8): *Yates* v. *South Kirkby, &c., Collieries* (9); *Eke* v. *Hart-Dyke* (10); *Clover, Clayton & Co.* v. *Hughes* (11); *M'Millan* v. *Singer Sewing Machine Co.* (12); *M'Luckie* v. *John Watson, Ld.* (13)

[LORD SHAW OF DUNFERMLINE referred to *Trim Joint District School Board of Management* v. *Kelly.* (14)]

The cases of *Drylie* v. *Alloa Coal Co.* (15) and *Coyle* v. *John*

(1) (1902) 5 F. 120.
(2) [1903] A. C. 443.
(3) [1908] 2 K. B. 807.
(4) [1905] A. C. 230.
(5) [1905] 2 K. B. 232.
(6) [1908] A. C. 437.
(7) 1909 S. C. 393, 397.
(8) [1910] 2 I. R. 105.
(9) [1910] 2 K. B. 538.
(10) [1910] 2 K. B. 677.
(11) [1910] A. C. 242.
(12) 1913 S. C. 346.
(13) 1913 S. C. 975.
(14) [1914] A. C. 667.
(15) 1913 S. C. 549.

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Watson, Ld. (1), which are most like the present, are distinguishable, because it was the accident that drove the man in the one case into the water, and in the other into the cold draught of air. Here it is the man's own choice that he went into the water. It may be said that the finding of the arbitrator meant that the extreme and exceptional exposure to damp and cold was the accident; but he does not say so, and that is not the fair construction of the words. Here the only accident occurred on October 23, and there is nothing to connect the injury with that.

A. H. B. Constable, K.C., and *D. Oswald Dykes* (both of the Scottish Bar), for the respondent, were not called upon.

The House took time for consideration.

March 6. VISCOUNT HALDANE. My Lords, I do not think that the question raised by this appeal is really a difficult one. The sheriff-substitute has found that the rheumatism from which the respondent suffered "was caused by the extreme and exceptional exposure to cold and damp to which he was subjected" by complying with the direction given to him on October 28, 1914, to bale the water out of the pit, a direction which necessitated his entering the water and standing in it up to his chest for eight hours. In order to make out his claim under the Workmen's Compensation Act, 1906, a workman must prove that there was "personal injury by accident arising out of and in the course of the employment." The finding of the arbitrator, who was in this case the sheriff-substitute, is made conclusive as to whether he has done so, unless there was on the face of the award error in law, or unless there was no evidence to support it. In the present appeal it is clear that it must be taken that the arbitrator found conclusively that there was injury due to an event arising out of and in the course of the employment. The one question is whether, reading the award as a whole, this event could be in point of law an accident within the meaning of the Act, for if so the arbitrator certainly had before him evidence on which he could find that it had happened.

On the question so remaining I think that the judgment in this

(1) [1915] A. C. 1.

House in *Fenton* v. *Thorley & Co.* (1) is conclusive. If the definition of accident within the meaning of the Act is "an unlooked for mishap or an untoward event which is not expected or designed," as stated by Lord Macnaghten, it covers the present case. If a qualification is added, as was proposed by Lord Robertson, to the effect that such mishap must arise from miscalculation of forces or inadvertence to them, I think the definition so qualified will still cover the case. For I interpret the finding of facts as amounting to this: that there was an entry into the cold water and prolonged exposure to it, the effects of which, being miscalculated, proved unexpectedly injurious. There is no suggestion of serious and wilful misconduct on the part of the workman which might, under s. 1, sub-s. 2 (*c*), of the Act, deprive him of the right to compensation. Indeed, it is plain that he went into the water to bale it out of the pit under directions from his employer, and he does not appear to have entertained such apprehensions of danger to himself as to induce him to disobey those directions. Had he died suddenly while so exposed, say of heart disease caused by the shock, there can be no doubt that this would have given a title to his dependants to claim on the footing of injury from accident. I am unable to see why a claim in respect of a less serious mishap should be excluded by the circumstance that the miscalculated action of entering the water took time to produce its consequences. This miscalculated action of entering the water in the present case must be taken to have constituted a definite event which culminated in rheumatic affection. It was the miscalculation which imported into that event the character of an accident within the meaning of the Act.

For these reasons I have come to the conclusion that the appeal ought to be dismissed with costs, and I move accordingly.

LORD KINNEAR. My Lords, I agree with the noble and learned Viscount that this appeal must be dismissed. It cannot be disputed that on October 28 the respondent sustained an injury (to wit, a sub-acute rheumatism) arising out of his employment; and the only question is whether the injury arose by accident in the sense of the statute. I agree with the majority of the judges

(1) [1903] A. C. 443.

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in the Court of Session that this question is not to be answered by pointing to the breakdown of a water pipe on October 23. It may be that the inception of the disease may be logically traceable to the bursting of the pipe through a series of causes and effects following one another in order. But the connection is too remote to avail for fixing the right to compensation. It is trite doctrine that inasmuch as "it were infinite for the law to judge the causes of causes, it contenteth itself with the immediate cause." I, of course, accept the law laid down in this House in the cases of *Fenton* v. *Thorley & Co.* (1) and *Clover, Clayton & Co.* v. *Hughes* (2), that the distinction of proximate from remote causes is not to be rigorously pressed in the application of the Workmen's Compensation Act. But the maxim, if it is not to be treated as an inflexible rule, may still be useful as "a guide," to use the language of a distinguished writer, "to the exercise of common sense." And this is quite in accordance with the opinion expressed by noble and learned Lords in the cases I have cited. For what they disapproved of was, in effect, the substitution of logical subtleties for the natural reading of plain facts. Accordingly, in the case of *Fenton* (3), where a workman was ruptured while trying to turn a wheel which had stuck fast in consequence of an accidental leak in a part of the machinery, Lord Robertson says: "The plain fact is that he miscalculated or by inadvertence did not compare the relative resisting forces of the wheel and his body. In this state of facts I am of opinion that this personal injury arose by accident" in the sense of the statute, and he adds, "I do not rely on the historical circumstance that the sticking of the wheel was caused by an accidental leak. I think myself that the leak is too remote to impart its own accidental character to the injury which ultimately resulted to this man." In like manner Lord Macnaghten, after explaining the accidents which had impeded the working of the wheel, says (4): "I mention these circumstances merely for the purpose of putting them aside. It was, indeed, argued by the learned counsel for the appellant that, if the mishap that befell Fenton was not of itself and apart from all other circumstances an accident within the meaning of that word as used in

(1) [1903] A. C. 443.
(2) [1910] A. C. 242.
(3) [1903] A. C. 443, 451.
(4) [1903] A. C. 445.

the Act, then these two things—the loss of a spoke in the wheel and the leak in the kettle—introduced an element of accident—a fortuitous element it was called—which would satisfy the terms of the enactment however narrowly it may be construed. In my opinion, they do not affect the question in the least."

I conceive that this decision, both on its negative and its affirmative side, is directly in point. On the other hand, in the case of *Coyle* v. *John Watson, Ld.* (1) it was held that the antecedent wreckage of a mine shaft was not too remote to be taken into account in determining the accidental character of the consequent exposure of a workman to a cold draught, whereby he contracted pneumonia. But this is in no way inconsistent with *Fenton's Case* (2), because the facts were altogether different. It was held in the later case that the incidents were directly connected and could not be treated as independent and detached factors. In this particular the present case is, in my judgment, distinguishable from *Coyle* (1) and not distinguishable from *Fenton.* (2)

If the breakage of the pump must, therefore, be treated as an historical incident and not as a direct cause of injury, we have still to look for the true determining fact on which the case depends. And I think the ninth finding of the stated case leaves no room for doubt upon this matter. I observe that the learned sheriff-substitute distinguishes with precision between his findings in fact, which are final, and the decision which he bases on the facts so found, and which admittedly involves matter of law. The finding which I take to be conclusive is " that the rheumatism from which the respondent suffered was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question." I agree with my noble and learned friend that the sheriff-substitute cannot be said to have misconstrued the statute when he found, farther, that " this was an injury by accident arising out of and in the course of his employment." On the particular occasion described the man exposed himself, in performance of his duty to his employer, to an extreme and exceptional degree of cold and damp, the character and effects of which he had miscalculated or through inadvertence had failed to foresee. If the sheriff-substitute thought that this was an untoward and

(1) [1915] A. C. 1. (2) [1903] A. C. 443.

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unlooked for mishap which was not expected nor designed, I see no ground in law for disturbing his decision.

The learned counsel for the appellants argued that in order to satisfy the Act there must be some distinct event or occurrence which taken by itself can be recognized as an accident, and then that the injury must be shown to have followed as a consequence from that specific event. But this is just the argument that was rejected in *Fenton* v. *Thorley & Co.* (1) It is unnecessary to say more; but I venture to add that the argument seems to me to rest upon a misreading of the statute, which can only have arisen from a failure to give any exact attention to the actual words. The statute does not speak of an accident as a separate and distinct thing to be considered apart from its consequences, but the words "by accident" are introduced, as Lord Macnaghten says, parenthetically to qualify the word "injury." The question, therefore, is whether the injury can properly and, according to the ordinary use of language, be called accidental. Another point which has been strenuously maintained in various cases could hardly have been stated were it not for the same deviation from the exact words of the statute. It is said that a disease is not an accident and is therefore excluded from the scope of the enactment. This seems to be suggested by an ambiguity in the use of the word "accident," which may either denote a cause or an effect; and the argument, assuming the latter meaning to be intended, is that no injury can be called accidental unless it be a visible hurt to the body, apparently caused by some external force. But there is no support for this notion to be found in the statute. For the statutory form of words gets rid of the double meaning completely. It is impossible to read the words "by accident" in the connection in which they occur as denoting only the apparent character of the harm sustained and not the cause or source from which it may have arisen. The conclusive answer, however, is that in the case of *Drylie* (2), where the argument was maintained with great force by Lord Salvesen, it was distinctly rejected by the decision of the Court, which was approved by this House in the case of *Coyle* v. *John Watson, Ld.* (3) This was in accordance with previous

(1) [1903] A. C. 443. (2) 1913 S. C. 549.
(3) [1915] A. C. 1.

decisions of the House; and I apprehend it must now be taken as settled that while a disease is not in itself an accident it may be incurred by accident, and that that is enough to satisfy the statute. On this point, indeed, the statute is its own interpreter. For the section which enables certain industrial diseases to be treated as accidents, although in fact they are not accidental, provides that this is not to affect the right of a workman to recover compensation in respect of a disease to which the section does not apply, "if the disease is a personal injury by accident in the sense of the Act."

I desire to add that I do not participate in the difficulties which Lord Johnston seems to have experienced in reconciling his opinion in the present case with the decisions in *Eke* v. *Hart-Dyke* (1) and *Steel* v. *Cammell, Laird & Co.* (2), and with the statutory conditions as to the notice of accident which must be given to the employer. These decisions are based on the undisputed principle that disease unconnected with accident is not within the scope of the enactment; and as regards the facts it was held that a disease contracted gradually from continuous exposure to sewer gas, but which could not be related to any particular time or to any unforeseen and undesigned event as the origin of the mischief, could not properly be described as the result of accident. Whether this was right or wrong as an inference of fact it is unnecessary to inquire. But nothing could be further from collision with the principle on which the present case must be decided. I do not doubt that accident must mean something of which notice can be given. But the stated case sets out a perfectly definite event at a definite time and place, and there could be no difficulty whatever in complying with the condition for notice. What may have been the best form of notice in the present case it is not for us to consider, because we know nothing about the notice actually given, except that no objection has been taken to it, and we must assume that it satisfied the statute.

LORD SHAW OF DUNFERMLINE. My Lords, the stated case narrates that the respondent was a brusher employed by the appellants in a coal mine. On October 28, 1914, on going down

(1) [1910] 2 K. B. 677. (2) [1905] 2 K. B. 232.

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the pit, he was directed to enter a body of water, which had been accumulating owing to the breakdown of a water pump five days before, and to bale out the water. He required to stand up to his chest in the cold water, and this he did for eight hours. He contracted sub-acute rheumatism. The sheriff finds "that the rheumatism was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question."

I do not see how it can be argued that this finding was not one of fact; nor do I see how, that being so, it did not justify the finding in law that the words of the statute were affirmed, namely, that the appellant sustained "an injury by accident arising out of and in the course of his employment."

Injury by accident is a composite expression. It includes a case like the present, namely, the contraction of disease, arising from extreme and exceptional exposure. This expression—contraction of disease—might also, no doubt, be analytically treated, and it might be said that the disease was the injury and its contraction the accident; but that carries the matter no farther, and in both cases the composite synthetic expression brings the events together just as they happen in life and in fact. This construction, besides being most simple, prevents the confusion that is apt to arise by the supposed difficulty of applying the Act because the event cannot be fixed in date. The disease and its contraction stand together so far as date is concerned; and in this case that date was October 28. The cases of *Drylie* (1) in the Court of Session and *Coyle* (2) in this House dealt with physical occurrences analogous to that in the present instance, and the same principle as that now given effect to was there applied.

On the wider ground, apart from precedent, I do not doubt that the statute has been correctly applied, and that the appeal should fail.

LORD PARMOOR. My Lords, the respondent was a miner who was working in the employment of the appellants as a brusher at their Newton pit, Kenmuirhill Colliery, when on October 23 the water pump broke down and a large quantity of water accumu-

(1) 1913 S. C. 549. (2) [1915] A. C. 1.

lated in the pit bottom. These facts form part of the history of the case, but I think it is impossible to say that there is any connection between the injury in respect of which the claim is made and the accident of the breaking down of the water pump which occurred on October 23.

On October 28 the respondent was directed to go down the pit, and was employed to bale water from the pit bottom. It is not denied that in the course of this employment, and arising out of it, he contracted an attack of sub-acute rheumatism, rendering him unfit to work. The sheriff-substitute has held that it was established as a fact that the rheumatism, from which the respondent suffered, was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question, and found that there was an injury caused by accident, and that the appellants were liable to the respondent in compensation. This finding is final, subject to an error in law. It was, however, argued on behalf of the appellants that there was no evidence from which it could competently be found that the incapacity of the respondent was attributable to an injury by accident. The Court of Session affirmed the determination of the sheriff-substitute, and it is against this decision that the appeal is brought.

My Lords, I cannot doubt that there was evidence from which the sheriff-substitute could competently find that the incapacity of the respondent was attributable to an injury by accident, using the word accident in its ordinary natural sense. The immersion in water, under conditions of extreme and exceptional exposure to cold and damp, may be regarded either as an unforeseen, or an untoward, event, and in either alternative as an accident. This being so, it was within the competency of the sheriff-substitute to find in favour of the respondent. The miscalculation of conditions, or carelessness as to conditions, is a common cause of accident, as in the case of a person being accidentally drowned through miscalculation of the depth of the water into which he has entered, or through carelessness in making no calculation as to its depth. There is no error in law, and this ends the case.

The decision of the Court of Session should be affirmed, and the appeal dismissed with costs.

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LORD WRENBURY. My Lords, in this case the workman sustained "personal injury" in the form of a physical ailment or illness, namely, sub-acute rheumatism. For the purpose of the construction of the Act, it must be immaterial whether the "personal injury" is death, or the loss of a limb, or disease, or illness. In each case the personal injury is not, and cannot be, the accident. It is the result of the accident. The phrase in the Act is "personal injury by accident." In this and in every case the inquiry must be whether the personal injury which has been sustained was sustained in such a state of circumstances as that it was sustained "by accident." I call particular attention to the fact that the language of the Act is not "personal injury by *an* accident," but "personal injury by accident." This means, I conceive, personal injury, not by design, but by accident, by some mishap unforeseen and unexpected; accidental personal injury.

While, on the one hand, it is true that the personal injury cannot be the accident which satisfies the phrase "by accident," yet, on the other hand, it is at the same time true that the result is a factor which assists in determining whether the injury was sustained by accident or not. If a man undresses on the beach in order to enjoy a bathe in the sea, goes voluntarily into the water, and is drowned by reason of the existence of a strong current, no one could deny that his death was accidental, that his death was by accident. In this case his going into the water was not accidental; the existence of the current was not accidental; but there was a factor which caused his death to be "by accident," and that was that unintentionally —perhaps by ignorance—he miscalculated the forces with which he had to do; he did not know of the current, or he thought that he was a strong enough swimmer to cope with it. He was wrong. The mishap which resulted from his bathing in this dangerous place was accidental. He had no intention or thought of going to his death. No other person intervened to conduce to the result. The sufferer's death was an unexpected event, an untoward result; it was by accident. If he had not been drowned it would be accurate to say that happily there had been no accident. That which I endeavour to express is perhaps best summarized by saying that although the "personal injury" (the death or disease or whatever it is) cannot be the accident,

yet the contraction of the disease or the incurring of the death may be by accident. The fact of disease is not an accident, but the contraction of disease may be by accident. Sect. 8, sub-s. 10, in using the words "if the disease is a personal injury by accident," means, I think, "if the disease is a personal injury incurred by accident."

My Lords, after these general observations I do not feel that any useful purpose will be served by travelling through the numerous cases which have been cited. The question is whether such facts have been found as that the arbitrator could from those facts arrive at the conclusion that the rheumatism was contracted under such circumstances as that the personal injury was by accident. The only finding which I need set out is: "9. That the rheumatism from which the respondent suffered was caused by the extreme and exceptional exposure to cold and damp, to which he was subjected on the occasion in question." Suppose the events had been that under directions given by the employer the man had gone into the water, and it had proved unexpectedly to be eight feet deep, and that he had been drowned. No one, I think, would dispute that his death would have been by accident. The accident would have arisen from miscalculation or ignorance as to the depth of the water, by reason of which the man was exposed to danger and was drowned. Is there any difference of principle between the case in which the water went over his head and caused death and the case in which the water extended as high as his chest and caused rheumatism? I think not. In all these cases it is essential to bear in mind that the appellate judge has not to determine whether he would have arrived at the conclusion at which the arbitrator arrived, but has to see whether such facts are found as that the arbitrator could arrive at that conclusion. Here the sequence of the language in the case after the finding which I have quoted shows that the arbitrator's finding is that the rheumatism was an injury caused by the extreme and exceptional exposure to cold and damp; in other words, that the extreme and exceptional exposure to cold and damp was that which caused the personal injury to be by accident. I take this to mean that neither employer nor man anticipated that the cold and damp would have been so extreme as to cause the illness; that the exposure of the man to it was an untoward event; that

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the result was unexpected; that the outcome was a mishap; and that consequently the injury was by accident. Whether I should have been of that opinion or not, I think the arbitrator could properly so hold.

I may add that the events of October 23 have, in my judgment, no bearing upon the matter. There was an accident on October 23 no doubt, but that accident caused nothing in the events of October 28. Suppose there is a railway accident by collision, and that a breakdown gang is sent to deal with the matter, and that a member of the breakdown gang is injured when dealing with it. The fact that he is sent to deal with the results of an accident by collision does not show that he suffered from the accident by collision. The fact that there was such an accident has no bearing upon the question whether he was injured by accident or not. So here the fact that the water would not have been there if the pump had not accidentally broken down on October 23 has no relevance to the question whether on October 28 the man was the victim of an accident.

The conclusion at which I arrive is that upon the facts found the arbitrator could hold as matter of law that the injury was by accident. The appellant, I notice, by his supplementary statement submits that the question is whether "it could competently be held by the arbitrator that the respondent's incapacity was attributable to *an* accident." By this divergence from the words of the Act the appellant has, I think, fallen into an error which taints all the subsequent submissions in his case. In the next sentence he alters the language which he uses and adopts the language of the Act, but seemingly he fails to notice that he has done so.

In my judgment the appeal fails and must be dismissed.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, March 6, 1916.

Agents for appellants: *Beveridge, Greig & Co., for W. T. Craig, Solicitor, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for respondent: *Sewell, Edwards & Nevill, for O'Hare, Lyons & Co., Writers, Glasgow, and J. Douglas Gardiner & Mill, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

LONDON ASSOCIATION FOR PROTECTION OF TRADE AND ANOTHER . . . . . } APPELLANTS;

AND

GREENLANDS, LIMITED. . . . . RESPONDENTS.

H. L. (E.)* 1916 Jan. 31.

Libel—Privileged Occasion—Association of Traders for Mutual Protection —Communication to Members.

An unincorporated body called the London Association for Protection of Trade, now comprising over 6000 members, was formed for the purpose (inter alia) of making inquiries as to the commercial standing and credit of traders. No qualification for membership was required beyond the payment of an annual subscription, which entitled each member to a certain number of inquiries free and to a further number for an additional payment, but subject to a condition in every case against divulging the information so acquired. The association did not trade for profit.

A member of the association applied for information as to the commercial credit of a trading company with whom he proposed to deal. The secretary of the association having applied to W. for the information, W. made a report, for which he was paid a small fee, containing untrue and defamatory statements of the company. The secretary sent a report in substantially the same terms to the member. In respect of the secretary's report the company brought an action for libel against W., the association, and the secretary. The jury returned a verdict of 750*l.* against W., against whom they found express malice, and of 1000*l.* against the association and the secretary, and judgment was entered accordingly. An application to the Court of Appeal by the two latter defendants for judgment on the ground that the report was published on a privileged occasion was refused. In the House of Lords the plaintiff company consented to the judgment obtained by them against the association being set aside:—

Held, Earl Loreburn doubting but not formally dissenting, that the secretary in making the inquiry and the report was acting, not as the agent of the association as a whole, but as the confidential agent of the particular member, and that the publication was therefore made on a privileged occasion.

Macintosh v. *Dun* [1908] A. C. 390 distinguished.

Decision of the Court of Appeal [1913] 3 K. B. 507 reversed.

APPEAL from a decision of the Court of Appeal. (1)

The facts are fully stated in the judgment of the Lord Chancellor

* *Present:* LORD BUCKMASTER L.C., EARL LOREBURN, LORD ATKINSON, and LORD PARKER OF WADDINGTON.

(1) [1913] 3 K. B. 507.

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and in the report of the case before the Court of Appeal, but the following summary may be useful.

The appellants the London Association for Protection of Trade were an unincorporated mutual association of traders established in 1842 and consisting at the present time of some 6000 members. The only qualification for membership was the payment of an annual subscription of 1*l.* 1*s.* for town members, 1*l.* 5*s.* for country members, and 1*l.* 10*s.* for foreign members. One of the objects of the association was the making of private inquiries as to the means, respectability, and trustworthiness of individuals and firms. Every member of the association was annually supplied with ten inquiry forms, each of which upon being filled up by him entitled him to receive information from the association as to any particular individual, firm, or company in the United Kingdom. If a member required more than ten inquiries in the course of the year he paid for them at the rate of 1*s.* each. The form of application for membership contained the following condition: "Every member undertakes to treat the information supplied by the association in strict confidence, and as for his exclusive use, and not to divulge it to any person upon any pretext whatever." The inquiry forms contained a similar condition. The association published a weekly gazette, and subscribers to the gazette were at liberty to make use of the inquiry department on payment of 1*s.* 6*d.* for single inquiries or 10*s.* 6*d.* for a book of ten prepaid inquiry forms. The association did not carry on business for profit. The appellant Hadwen was the secretary of the association.

The respondents were a limited company carrying on business as drapers and house furnishers in Hereford.

In March, 1910, Shand Kydd, who carried on business as a manufacturer and designer of wall-paper decorations in Kentish Town, and who was a member of the association, sent a request to the association on one of the inquiry forms for information as to the credit of the respondents, to whom he had sold goods for 2*l.* 5*s.* The appellant Hadwen applied for information to one Wilmshurst, a commercial agent and debt collector of Hereford, who was in the habit of answering inquiries for the association at 6*d.* apiece. The request for information contained the prohibition against divulging the information to be acquired. In answer to this inquiry

Wilmshurst supplied information which falsely reflected on the respondents' credit by misstating the nature and effect of the debentures to which the respondents' business was subject. This information was edited and slightly altered by the appellant Hadwen and on April 2, 1910, was handed on by him in good faith to Kydd.

The respondents thereafter commenced an action against Wilmshurst and the appellants for libel in respect of the report communicated to Kydd. The appellants by their defence pleaded that the libel was published on a privileged occasion and without malice. The action was tried before Lord Alverstone C.J. and a special jury. The jury returned a verdict of 750*l.* against Wilmshurst, against whom they found express malice, and 1000*l.* against the appellants, and judgment was entered accordingly. The appellants applied to the Court of Appeal for judgment on the ground that the libel was published on a privileged occasion and without express malice, or, alternatively, for a new trial on the ground of excessive damages. Wilmshurst did not appeal. The Court of Appeal (Vaughan Williams L.J. and Hamilton L.J., Bray J. dissenting) refused to enter judgment for the appellants, but granted a new trial.

The appellants now applied to this House to alter the order of the Court of Appeal by directing judgment to be entered in their favour.

In the course of the argument before the House the respondents, upon an intimation from their Lordships that in the circumstances the action could not be maintained against an unincorporated association, consented, for the purpose of facilitating the determination of the question of privilege, to have the judgment obtained by them against the association set aside.

1915. Oct. 21, 22, 25, 26, 29; Nov. 23; Dec. 7. *Sir Robert Finlay, K.C.*, and *Leslie Scott, K.C.* (with them *Heber Hart, K.C.*), for the appellants. The communication complained of as a libel was made on a privileged occasion and no action will lie against the appellants in the absence of actual malice. The principle upon which the appellants rely is stated by Parke B. in *Toogood* v. *Spyring* (1) to be that the occasion is privileged where the communication is fairly made by a person in the discharge of some public

(1) (1834) 1 C. M. & R. 181, 193.

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or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society. This is not like the case of a man whose business is collecting information for gain, and *Macintosh* v. *Dun* (1) is distinguishable on that ground; but if not distinguishable it is wrongly decided. Being a decision of the Privy Council, though it is entitled to great weight, it is not binding on this House, and it is opposed to the law as laid down in the United States. This association does not trade for profit and acts solely for the benefit of its members, and the information is communicated only to the member interested. The association does for its members what the individual tradesman might have done for himself. A report made by an agent to an individual tradesman as to the financial position of a person with whom he wants to deal would be privileged, and the fact that a number of tradesmen honestly combine for the purpose of acquiring this kind of information because they find that it can be acquired more conveniently through the medium of an association does not place them in a less favourable position than the individual tradesman, where proper precautions are taken to prevent the communication from being divulged except to the person interested. It is for the public welfare that information of this kind should be protected. Assuming that the occasion was privileged, the relation of Wilmshurst to the association was not such as to make his malice the malice of the association, and there being no evidence of malice against the appellants, they are entitled to judgment. [They also referred to *Edmondson* v. *Stevenson* (2); *Pasley* v. *Freeman* (3); *Bromage* v. *Prosser* (4); *Smith* v. *Thomas* (5); *Storey* v. *Challands* (6); *Coxhead* v. *Richards* (7); *Amann* v. *Damm* (8); *Stuart* v. *Bell* (9); *Davies* v. *Snead* (10); *Fleming* v. *Newton* (11); *Gardner* v. *Slade* (12); *Searles* v. *Scarlett* (13);

(1) [1908] A. C. 390.
(2) (1766) Bull. N. P. 8.
(3) (1789) 3 T. R. 51, 60, 64.
(4) (1825) 4 B. & C. 247, 256.
(5) (1835) 2 Bing. N. C. 372, 380.
(6) (1837) 8 C. & P. 234.
(7) (1846) 2 C. B. 569.
(8) (1860) 8 C. B. (N.S.) 597.
(9) [1891] 2 Q. B. 341.
(10) (1870) L. R. 5 Q. B. 608.
(11) (1848) 1 H. L. C. 363, 379.
(12) (1849) 13 Q. B. 796, 801.
(13) [1892] 2 Q. B. 56.

Harrison v. *Bush* (1); *Whiteley* v. *Adams* (2); *Clark* v. *Molyneux* (3); *Robshaw* v. *Smith* (4); *Waller* v. *Loch* (5); *Jenoure* v. *Delmege* (6); *David Jones* v. *Basma House* (7); *Bayne & Thomson* v. *Stubbs* (8); *Keith* v. *Lauder* (9); *Barr* v. *Musselburgh Merchants Association* (10); *Howe & McColough* v. *Lees* (11); *Foley* v. *Hall* (12); *Robinson* v. *Dun* (13); *Todd* v. *Dun, Wiman & Co.* (14); *Ormsby* v. *Douglass* (15); *Sunderlin* v. *Bradstreet* (16); *Erber* v. *Dun* (17); *Locke* v. *Bradstreet Co.* (18); *King* v. *Patterson* (19); *Douglass* v. *Daisley.* (20)]

Dickens, K.C., and *Clavell Salter, K.C.* (with them *Hugh Fraser*), for the respondents. This case is covered by *Macintosh* v. *Dun.* (21) That decision did not turn simply on the question of making profits, but the test is shown to be whether it is for the public benefit that the occasion should be privileged. It is not for the public benefit that a society carrying on business in the way in which this association carries on business should be entitled to the immunity claimed. Membership of the association is unlimited in numbers, in qualification, and in place. Apart from the payment of the subscription there is no existing relation between the parties out of which privilege could arise, and a privileged occasion cannot be created merely by a contract between several persons for the supply of information. This society exists solely for the mutual private interest of its members and not for the public interest at all, and its reckless mode of conducting business is a danger to the community. The association could have verified the information acquired from Wilmshurst by a search in Somerset House at a cost of 2*s.* 6*d.*, but they neglected to do so. It is more to the public interest that a tradesman should not be deprived of his commercial character without redress than

(1) (1855) 5 E. & B. 344.
(2) (1863) 15 C. B. (N.S.) 392.
(3) (1877) 3 Q. B. D. 237.
(4) (1878) 38 L. T. 423.
(5) (1881) 7 Q. B. D. 619.
(6) [1891] A. C. 73.
(7) Unreported, cited by Bray J. in [1913] 3 K. B. 552.
(8) (1901) 3 F. 408.
(9) (1905) 8 F. 356.
(10) 1912 S. C. 174.
(11) (1910) 11 C. L. R. 361.
(12) (1891) 12 N. S. W. L. R. 175.
(13) (1897) 24 Ont. App. R. 287.
(14) (1887) 15 Ont. App. R. 85.
(15) (1868) 37 N. Y. (C. A.) 477.
(16) (1871) 46 N. Y. (C. A.) 188.
(17) (1882) 12 Fed. Rep. 526.
(18) (1885) 22 Fed. Rep. 771.
(19) (1887) 60 Amer. Rep. 622.
(20) (1902) 114 Fed. Rep. 628.
(21) [1908] A. C. 390.

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that information acquired in this way should be protected. The Scottish cases of *Keith* v. *Lauder* (1) and *Barr* v. *Musselburgh Merchants Association* (2) and the English case of *David Jones* v. *Basma House* (3) are all cases of traders pooling their information for the common benefit. It was the legitimate interest of all that each member should communicate his own personal experience, but that is the fair limit of the privilege. Further, this is a joint tort, and the malice of Wilmshurst destroys the privilege. The publication by the appellants was in furtherance of Wilmshurst's intention that the news should be transmitted, and that makes him a party to the publication by them.

Leslie Scott, K.C., replied.

The House took time for consideration.

1916. Jan. 31. LORD BUCKMASTER L.C. My Lords, this case affords the unedifying spectacle of litigation conducted with such disregard of the rules of procedure that extrication from the resulting tangle has been all but hopeless.

The plaintiffs, who are a limited company, instituted proceedings in respect of a libel. They added three defendants to their writ—an unincorporated association known as the London Association for the Protection of Trade, a man called Hadwen, who was the secretary of the association, and a man called Wilmshurst—and sued them all as jointly responsible for the wrong done by the publication of an untruthful report sent by the defendant Hadwen to a Mr. Shand Kydd.

The association consisted of some 6200 members; it was unincorporated and consequently could not be made a defendant to the action in any capacity whatever. As an entity it could neither publish nor authorize the publication of a libel; and this appears to have been recognized before your Lordships' House, as the plaintiffs have consented to strike out the association from the action. Wilmshurst, again, was no member of the association. He supplied information at certain prices, and he had not, in fact, published the libel which was the subject of the suit.

(1) 8 F. 356.
(2) 1912 S. C. 174.
(3) Unreported, cited by Bray J. in [1913] 3 K. B. 552.

At the hearing no amendment whatever was attempted of the proceedings; and two judgments, separate in form and different in amount, were entered against Wilmshurst on the one hand and the association and Hadwen on the other for the one libel, judgment being entered against Wilmshurst, who was found guilty of malice, for 750*l.*, and against the other defendants, who were held not to have been malicious, for 1000*l.*; and it certainly appears as though the judgment against Wilmshurst was due to his having published a libel which was not the subject of the suit.

In these circumstances the association and Hadwen appealed to the Court of Appeal and served Wilmshurst. They asked that judgment should be given in their favour on the grounds that it had been wrongly entered and that the occasion of the publication was privileged; or, alternatively, a new trial, because the damages were excessive and were wrongly found against the separate defendants. The latter relief was accorded to them, and they have appealed to this House, asking for the larger measure, which was denied.

The argument before your Lordships was entirely directed to the question of privilege, but before this could be decided it became plain that it was necessary to remove the confusion caused by the circumstances to which I have referred. Accordingly the plaintiffs agreed to having the judgment against the association set aside, and then, to avoid the result of the remaining defendant, Hadwen, pleading the existence of the judgment against Wilmshurst as a complete defence in any new trial, they asked, at the suggestion of your Lordships, that Wilmshurst might be brought before this House to show cause why the judgment against him should not be set aside.

He duly appeared and raised no objection, but as the majority of your Lordships are of opinion that the judgment against Hadwen cannot stand, the reason for setting aside the judgment against Wilmshurst is removed, and that judgment, which has never been the subject of appeal, may remain.

The principles that regulate an action for defamation of character are well known; nor do I think advantage would arise from any attempt to restate or recapitulate the conditions which have been so often the subject of consideration in all the Courts.

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There is, indeed, danger of confusion if new words are used to define or explain that which is already well established and clear. In the present case, although much discussion has arisen about many of the authorities in which these principles are incased, there has not, except in the case of *Macintosh* v. *Dun* (1), been any real controversy either as to their validity or their meaning.

The question here is whether certain words, published under circumstances which I will shortly detail, were published on a privileged occasion. If they were, judgment ought to have been entered for the appellants, since the late Lord Chief Justice, who tried the case, held that against them there was no evidence of malice, and from that decision no appeal has been brought. If they were not, the action must go back to be retried.

A privileged occasion such as that said to exist in the present case is an occasion when the publication complained of was, to use the words of Parke B. in *Toogood* v. *Spyring* (2), "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." And the learned judge continues with these important words: "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

I do not think that any of the subsequent explanations, or definitions, have made any variation in the principle thus enunciated, nor added anything by way of explanation to this clear exposition of the law. The long list of subsequent authorities to which your Lordships were referred do nothing but afford illustrations of the different circumstances to which this principle may be applied, and, with the exception of the case of *Macintosh* v. *Dun* (1), none of the facts upon which those authorities depend are in close relation to those of the present case. Indeed, the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact. New arrangements of business, even new habits of life, may create unexpected combinations of circumstances which, though they differ from well-known instances

(1) [1908] A. C. 390. (2) 1 C. M. & R. 181, 193.

of privileged occasion, may none the less fall well within the plain yet flexible language of the definition to which I have referred.

Again, it is, I think, essential to consider every circumstance associated with the origin and publication of the defamatory matter, in order to ascertain whether the necessary conditions are satisfied by which alone protection can be obtained, but in this investigation it is important to keep distinct matter which would be solely evidence of malice, and matter which would show that the occasion itself was outside the area of protection.

The facts of this case are these :

The London Association for the Protection of Trade is an unincorporate body regulated by certain rules. Its objects, as defined in the prospectus, are as follows :—

(1.) The making of private inquiries as to the means, respectability, and trustworthiness of individuals and firms.

(2.) The collection of debts.

(3.) The detection and exposure of swindlers.

(4.) The issue of gazettes, containing authentic particulars of bills of sale, county court judgments, bankruptcies, and other preferential securities ; also lists of creditors in bankruptcies.

(5.) To afford gratuitous legal advice to members on all matters connected with their trading operations.

(6.) To aid in amending the laws affecting trade and commerce, and to suggest proper remedies for what may appear injurious to traders generally.

(7.) To forward a monthly report to members, containing information of frauds and attempts at swindling, which may be proceeding at the time.

(8.) To keep a register of the names of known swindlers, and also of persons whose addresses are required by members of the association.

According to the rules, members are enrolled after their names have been approved by a committee of management. There is no considerable body of evidence as to whether or not this rule is strictly obeyed, but it appears that a firm known as Whitmore's Trading Company, Limited, were treated as entitled to the rights of a member before, in fact, they had filled up the necessary application form, and consequently before their name could have been submitted to the committee for approval.

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For the present purpose the only branch of the association's business to which it is necessary to refer is that associated with the inquiry department. This department is open to all members, whether they be town, country, or foreign members, and whether they have subscribed upon the footing of obtaining all the full benefits of the society, or only subscribe to the gazette. In each case single inquiries are made by the association for 1*s.* 6*d.* apiece, or a book of ten prepared inquiry checks are furnished for 10*s.* 6*d.* The operations of the society are very widespread, and in their prospectus they announce that by their affiliation with the Association of Trade Protection Society of the United Kingdom the members have at their service an organization extending throughout the whole of the kingdom and to all parts of the world. It is a strict condition of membership that all information supplied is supplied in strict confidence and for the exclusive use of the member who seeks it, and he is bound not to divulge it to any person upon any pretext whatever. This condition is imposed by the application for membership, and by the rules it is provided that any member who divulges any such information shall be deemed ineligible to continue a member and shall forfeit his subscription.

The society does not distribute any profit, nor does it trade with the object of making a profit, but in fact it has a considerable surplus on the year's accounts, and its property consists of assets to the value of upwards of 11,000*l.*

It appears that a Mr. Shand Kydd, who trades at 73, Highgate Road, Kentish Town, was a member of the association. He is a designer of wall-paper decorations, and he was anxious to obtain information as to the credit of a firm known as Greenlands & Co., Limited, who carried on business at Hereford as house furnishers and drapers. He accordingly applied on March 30, 1910, to the association, asking if Greenlands & Co. were safe for 20*l.* to 30*l.*, and also for their length of credit and general information. This application was made upon a form which the association issue for that purpose, and that again contained the statement that the information was given in strict confidence and was not to be divulged. The association had at Hereford an agent of the name of Wilmshurst. He had acted as their agent since 1895, and he carried on business as an accountant and auditor and fire loss assessor at Broad Street, Hereford. It

appears that he furnished information from time to time to the association for a payment of 6*d.* in respect of each inquiry, but although he had been bankrupt in 1890, it was stated by the secretary of the association in evidence, and was not challenged in cross-examination, that the association had never had any reason to doubt the good faith of his answers.

In answer to the request of the secretary, he furnished a statement which was slightly altered by the secretary and by him published to Mr. Shand Kydd. It is this publication that is the subject of the present proceedings, and it is set out in full in paragraph 3 of the statement of claim. The grave and essential feature of the libel is this: It states that there are heavy debentures charged on the assets of the company to the amount of 36,100*l.*, but that for the credit asked they might be taken as a fair trade risk. This statement was inaccurate in a very material respect. The sum of 36,100*l.* was not in fact charged upon the assets of the company, but two sums of 18,100*l.* and 18,000*l.*, the former secured by specific mortgage and the other by mortgage debentures, were charged upon the real and leasehold property which the company owns. The whole of the stock in trade of the company, their book debts, their goodwill, and all their floating assets were entirely free from any mortgage whatever, and constituted a large and valuable property.

The evidence, which is uncontradicted, establishes that this company was in an exceptionally strong financial position, and had carried on a large and very successful business for some time past. The obvious innuendo, therefore, of the libel and the actual statement of fact that it made were both inaccurate, and the only question that arises is whether the circumstances under which it was published constitute a privileged occasion, and thus throw upon the plaintiff the burden of proving that the publication was maliciously made.

In my opinion they do. A trader is clearly entitled to make inquiries about the commercial credit of a person with whom he proposes to trade. He need not make those inquiries himself. He may constitute an agent to make them on his behalf. He need not inquire of any person of whom he has personal knowledge, or with whom he has had trade relations. If the inquiry be honestly and prudently made, it is impossible to fix exact limits within which it must be confined. The extended character of trade, the modern

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combination of many businesses of a different nature under one control, the innumerable and far-reaching branches by which modern enterprise is extended, are all considerations which must be borne in mind in considering how far and by what means inquiry as to a new customer can be properly made. This, of course, is not the only consideration; there is at the same time the essential need of safeguarding commercial credit against the most dangerous and insidious of all enemies—the dissemination of prejudicial rumour, the author of which cannot be easily identified, nor its medium readily disclosed.

The present case is an illustration of both sides of the question. Mr. Shand Kydd was in London, and desired to enter into trade relations with a company in Hereford. It would, I think, have been a perfectly reasonable occasion for inquiries honestly made in Hereford as to the standing of this concern, and those inquiries might have been made on Mr. Shand Kydd's behalf by a proper agent appointed for the purpose, and in such circumstances, whatever considerations might attach to the communication to such agent, his answer to his principal would clearly have been made on a privileged occasion.

I cannot help thinking that in these circumstances the fact that Mr. Shand Kydd made the inquiry through the means afforded by his membership of a large group of traders who had associated themselves together for the purpose of providing an agent through whom such inquiries were to be made cannot of itself take away the privilege that would have existed if the association had never intervened. It is said, however, that the case of *Macintosh* v. *Dun* (1) is a clear expression of opinion that such a means of obtaining knowledge is not permitted. I do not think that *Macintosh* v. *Dun* (1) affects the consideration of this case, beyond showing that in determining what is a privileged occasion all the circumstances under which the publication is made need to be considered for the purpose of determining whether privilege attaches or no. In that case an association was conducted for profit by certain people, themselves wholly unconnected with trade. They acquired from all sources information about traders, and carried on the business of disseminating this information for reward to the various subscribers to their agency. It was decided that such a communication was not made in discharge

(1) [1908] A. C. 390.

either of a public or a private duty, and was not warranted by any reasonable occasion or exigency. That decision leaves untouched the wider question as to whether groups of people, however large, may not combine together in order to provide the necessary information for carrying on business. They can themselves control, through their committee, the person by whom the inquiries are made and the method by which such inquiries are conducted, and they obviously have an interest in not receiving inaccurate and misleading statements, for no man in trade is desirous to avoid entering into a profitable trade transaction; his only interest is to render himself secure by the disclosure of trustworthy information. To some extent the same thing might be urged on behalf of the defendant in the case of *Macintosh* v. *Dun*. (1) It may be said that the success of the business of the defendant in that case depended upon his news being accurate. The essential difference lies in this—that, accurate or no, no single one of the persons who inquired through him could possibly influence in any way the means by which his inquiries were set on foot. Nor could he have fairly been regarded as the agent of the person to whom he sold the information he acquired.

There are further circumstances in the present case upon which the respondents place great reliance. The fact that the answers to the inquiries were obtained upon payment of a trivial sum of money; the fact that the information was capable of being corrected by reference to the Register of Companies, and that this was not done—these facts, it is suggested, show that the method of carrying on business is of such a character that it cannot be to the public good to obtain information by these means. To my mind the first of these considerations applies to determining the question whether the publication of the libel by Wilmshurst to Hadwen was made on a privileged occasion, and it is not this libel which is sued on, and the latter is relevant only on the question of malice. For these reasons I think that the learned judge, when once he held there was no evidence of malice on the part of Hadwen, should have held that as against him the action had failed.

EARL LOREBURN. My Lords, the parties in this case desire a decision upon the evidence as it stands, unsatisfactory though it

(1) [1908] A. C. 390.

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be, whether or not the occasion on which this libel was published ought to be regarded as privileged.

The law was established long ago in *Toogood* v. *Spyring* (1), and its application was illustrated in the case before the Privy Council of *Macintosh* v. *Dun*. (2) That case is of equal authority with our own, and I think it shows that considerations of public policy must influence a Court in deciding these questions of privilege.

I agree that the defendant association ought to be struck out of the record, for the reasons already stated. As to the defendant Wilmshurst, it would be necessary to discharge the judgment against him if a judgment against Hadwen were to be entered, for they were sued as joint tortfeasors. But unless it is necessary in order to remove an impediment in the way of proceeding against Hadwen, I am ill disposed to interfere. For Wilmshurst has not appealed against the judgment, and there is no doubt that he acted maliciously.

As regards the defendant Hadwen no malice has been proved. Accordingly he must succeed if the occasion was privileged, and that depends on one question. In publishing this libel was he acting as agent of the association, or was he merely an agent for Mr. Shand Kydd, on whose behalf he made inquiry and to whom he reported ? That remits us to the facts, and no question was put to the jury upon this point.

If this gentleman was the agent of the association to inquire for each member who might invoke his services, then, upon the evidence as it now stands, I do not think the occasion would be privileged. For I think we should look at who and what are the persons to whom and by whom the libellous communication is made, and to the manner in which they conducted themselves, before admitting the privilege claimed.

It is right that proper facilities should be given for ascertaining the financial position of traders. But we must remember that private reputation and credit are at stake, and I cannot think that privilege should be allowed unless there is not merely good faith but also real care to make inquiry only in reliable quarters, and to verify it where practicable. The absence of such care may, no doubt, be evidence of malice, but it is also relevant on the point

(1) 1 C. M. & R. 181. (2) [1908] A. C. 390.

whether there is privilege or not, and may, in my judgment, be fatal to the privilege even if malice is disproved. The Court has to hold the balance, and, looking at who published the libel, and why, and to whom, and in what circumstances, to say whether it is for the welfare of society that such a communication, honestly made, should be protected by clothing the occasion of the publication with privilege. The facts here were imperfectly presented at the trial, and therefore I may easily be at fault in coming to a conclusion. I do not think on those facts there was a privileged occasion if Mr. Hadwen is to be regarded as acting in the capacity of agent for the association as a whole. I will not review the facts, but I do not think the methods of this association, consisting as it does of 6000 persons, are salutary or deserve protection. But if he is to be regarded as confidential agent of Mr. Kydd alone when he wrote the libel sued on, then I do think the occasion privileged. And that is the view your Lordships take of his agency on these imperfect materials. It ought to have been left to the jury to say whose agent Mr. Hadwen was. That being so, Hadwen succeeds.

I must express my strong feeling that Messrs. Greenlands have been cruelly defamed, and that they may have lost a remedy to which they were entitled, by a miscarriage at the hearing more difficult to repair than any I have met with in my former experience. I believe they have acted wisely in seeking a final decision even on imperfect materials, so as to end this litigation; and though the decision will be adverse to them, they have at least had the satisfaction of amply vindicating their good fame, which has been so unjustly assailed.

LORD ATKINSON. My Lords, the suit out of which this appeal has arisen was wrongly framed, was unsatisfactorily conducted, and has led to illegal if not indeed absurd results.

Two individuals, Arthur Wilmshurst and J. H. Hadwen, together with an association of persons, neither forming a partnership nor an incorporated company, were sued as joint tortfeasors, and were, therefore, as all tortfeasors are, jointly and severally liable for the tort charge if proved against them.

The main and real tort sued for was the publication, on or about April 2, 1910, to one Shand Kydd of a libel contained in a letter

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addressed to him, in the words set out in the third paragraph of the statement of claim. The defendants other than Wilmshurst filed a joint defence. The plaintiffs did not proceed under Order XVI., r. 9, to sue one or more of the members of the association on behalf of themselves and their brother members. They sued the association in its trade name, the London Association for the Protection of Trade, as if it were a legal entity. The very object of this r. 9 was to facilitate the bringing of actions against unincorporated aggregates of persons. But in order to take advantage of it, the fact that the plaintiff or defendant sues or is sued on behalf of himself and others must be stated in the title to the action: *In re Tottenham* (1); *Worraker* v. *Pryer*. (2)

By their defence the appellants admitted the publication on April 4, 1910, of the main libel complained of, pleaded as to the innuendo that they did not publish the libel in the defamatory sense alleged, and that it was published on a privileged occasion without malice.

It was proved at the trial that the defendant Wilmshurst, who had been made a bankrupt in 1890 (whether he was still undischarged or not did not appear), was the local correspondent of the association at Hereford, where the plaintiffs carried on their business, that the association had for many years employed him as such to furnish reports in reply to inquiries addressed to the secretary of the association, J. H. Hadwen, by members of that body touching the solvency of persons with whom presumably the inquirers desired to deal, that Wilmshurst's remuneration was 6*d*. per report. No question was asked or evidence given as to whether it was the practice of Hadwen or any official or member of the association to make any effort to verify the truth of Wilmshurst's reports. In the present case it was proved that a request was lodged with the secretary by one Shand Kydd on March 30, 1910, asking "if the plaintiffs were safe for, say, 20*l*.—30*l*., their mode of payment, length of credit, and general information."

On the following day a letter was written by Hadwen to Wilmshurst asking for information touching the credit, standing, and character of the plaintiffs, and stating that "his reply, to be of real service, should be sent if possible by return of post." The

(1) [1896] 1 Ch. 628. (2) (1876) 2 Ch. D. 109

reply was, apparently, sent on the following day, April 1. And after some unimportant alterations had been made in it was communicated by Hadwen to Shand Kydd by letter bearing date April 4, 1910. This is the main libel complained of. The other libels were replies to what were styled "trick" applications, which were sent in designedly for purposes which are immaterial.

The jury found that Wilmshurst was actuated by actual malice, and returned a verdict against him for malicious libel for 750*l.*, and against the society and Hadwen for 1000*l.*

The late Lord Chief Justice had told the jury that there was no evidence of malice against the defendants other than Wilmshurst, but that they might when they came to assess damages take into consideration whether the former were lax in their conduct in publishing the libel. Upon these findings the Lord Chief Justice entered judgment against the society and Hadwen for 1000*l.* and costs, and against Wilmshurst for 750*l.* and costs. In the course of the discussion, Sir E. Clarke, who appeared for the plaintiffs, said: "My Lord, I ought to mention, so as to avoid any difficulty hereafter, that your Lordship has said there is no evidence of express malice against the society and Hadwen. I agree, if that were taken alone, but the point that the malice has been found against Wilmshurst affects them"; and the Lord Chief Justice replied: "I indicated that, and I mentioned the case in which I think I am right in saying Dunn was the name of the agent. The defendants were held liable for the libel published by their malicious agent."

The findings of the jury must, I think, mean that the publication of the letter of April 2, 1910, to Kydd was the joint act of the three defendants, the association being treated as a legal entity suable at law, which again must mean that Wilmshurst sent his report to Hadwen with the knowledge and intention that it would be communicated to the inquirer. If so, each of the three defendants was a joint tortfeasor, and being that they were jointly and severally responsible for the wrong done, and for the entire damage sustained: Co. Litt. 232a; 1 Wms. Saunders (1845 ed.), 291 (f).

The verdict, accordingly, against each and all of them should have been a verdict for the entire amount of the damage sustained. Each of the joint wrong-doers must be presumed to have known the wrongful nature of their joint act. There cannot be any contribution

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between them: *Adamson* v. *Jarvis* (1); *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (2) The release of one would operate as the release of all. The payment by one of the damages would discharge them all. Nay, even the recovery of judgment against one would be a bar to any action against the others for the same cause, although the judgment remained unsatisfied,—*King* v. *Hoare* (3) and *Brinsmead* v. *Harrison* (4)—because the cause of action transit in rem judicatam.

Now, applying those well-known principles and rules of law to the facts of the present case, how does the matter stand? The damages to which the plaintiffs are found to be entitled amount apparently to 1750*l*. Each of the wrong-doers is at law liable to the full amount of these damages, but the jury have apportioned the damages between the defendants according, I presume, to their own notions of their relative culpability; and yet the defendant who was actuated by express malice is only mulcted in the sum of 750*l*., while Hadwen, who was not found to have been actuated by express malice at all, is mulcted in the sum of 1000*l*. This can only be explained by the fact that the jury acted in the belief that the society would pay the amount of the verdict against themselves and their secretary. Well, then, even if Wilmshurst pays, is Hadwen discharged, or if Hadwen pays is Wilmshurst discharged, or, according to the decision in *Brinsmead* v. *Harrison* (4), is the judgment against Wilmshurst per se a discharge even pro tanto of the judgment against Hadwen, or is the judgment per se against the latter, without satisfaction, a discharge of the judgment against Wilmshurst? And again, if the verdict against the association and Hadwen be set aside on the ground that the libel was, as to them, a privileged communication, are the plaintiffs only to have a verdict against the malicious libeller Wilmshurst for less than half the damages they are found to be entitled to?

I put these questions to show the absurdities to which the course taken at the trial necessarily leads. In my view the jury had no power, authority, or jurisdiction whatever to apportion between joint wrong-doers, as they have done, the damages which they found the plaintiffs had sustained. This is a matter of want of jurisdiction

(1) (1827) 4 Bing. 66.
(2) [1894] A. C. 318, 324.
(3) (1844) 13 M. & W. 494.
(4) (1872) L. R. 7 C. P. 547.

which no consent can cure, and I doubt much if the Lord Chief Justice had any jurisdiction to enter up, as he has done, judgment on such a verdict, a verdict which, on its face, is contrary to law and found without authority. I think he should have told the jury that each joint wrong-doer was liable for the entire of the damage sustained by the victim of the joint wrong, and have refused to receive such a verdict.

In my view, therefore, this verdict and the judgment entered upon it cannot be allowed to stand. They must, I think, be set aside as wholly illegal and improper.

It is agreed upon both sides that the association must be struck out from the pleadings. They cannot be sued as a legal entity in the manner they have been sued; but it is deemed desirable that the question should be determined by the House whether or not the judge at the trial should have ruled on the evidence then before him that the occasion upon which the libel complained of was published, namely, on April 2, 1910, was a privileged occasion. And I proceed to deal with that question.

I shall not attempt to hazard a new definition or description of a privileged occasion. I do not think that the statements as to what constitutes a privileged occasion made by Parke B. in *Toogood* v. *Spyring* (1), by Erle C.J. in *Whiteley* v. *Adams* (2), by Lord Campbell in *Harrison* v. *Bush* (3), and by Lindley L.J., as he then was, in *Stuart* v. *Bell* (4) can be improved upon.

Parke B., speaking of privileged communications, said: "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society." In an earlier portion of the passage, however, he had said that the law considers such a publication as malicious unless it is fairly made by a person in discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned.

These are, apparently, the tests by which, in the learned judge's opinion, it may be determined whether defamatory matter has been published under circumstances which rebut implied malice. In the latter part of the passage he gives the reason why a publication which

(1) 1 C. M. & R. 181, 193.
(2) 15 C. B. (N.S.) 392, 414.
(3) 5 E. & B. 344.
(4) [1891] 2 Q. B. 341, 347.

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fulfils these tests is protected, and that reason is "the common convenience and protection of society." But Parke B. never meant, I think, to lay it down that implied malice is to be taken to be rebutted where those tests have not been fulfilled, although the common interest and protection of society might be served by the publication of the defamatory matter in question.

Erle C.J. in *Whiteley* v. *Adams* (1) laid down what are the tests in these words: "If the circumstances bring the judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the party writing or uttering them, he is bound to hold that the action fails." Later on he says (2): "Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty or what amount of interest will afford a justification," but that it was clearly a question for the judge to decide. Later on he points out that the law as to privileged communication was much more restricted formerly than in modern times, and says: "The rule has since become gradually more extended, upon the principle that it is to the general interest of society that correct information should be obtained as to the character of persons in whom others have an interest."

It was in this connection that the Chief Justice used the words quoted by Lord Macnaghten in *Macintosh* v. *Dun*. (3)

In *Harrison* v. *Bush* (4) Lord Campbell described what I have styled the "test" to the same effect, but in somewhat different language; he said "a communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty," although it contains defamatory matter. Later on he said, "'Duty,' in the proposed canon, cannot be confined to legal duties which may be enforced by indictment, action or mandamus, but must include moral and social duties of imperfect obligation." He said nothing whatever about the "general interest of society," because his apparent

(1) 15 C. B. (N.S.) 414.
(2) Ibid. 418.
(3) [1908] A. C. 390, 399.
(4) 5 E. & B. 344, 348, 349.

object was to lay down the "canon" itself, and not to justify it by showing its foundation.

In *Stuart* v. *Bell* (1) Lindley L.J., as he was then, no doubt used the following words: "The reason for holding any occasion privileged is common convenience and welfare of society" (quoting Parke B.'s words), "and it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are privileged, and separate them from those which are not."

But further on he approved of and adopted Erle C.J.'s statement of the law, as to what is necessary to make an occasion privileged.

Blackburn J., in *Davies* v. *Snead* (2), said where a person is so situated that it becomes right in the interest of society that he should tell a third person certain facts, then, if he, bona fide and without malice, does tell them, it is a privileged communication. But this is only another way of saying that where a social or moral duty rests upon a person to tell a thing, and he does tell it, under the circumstances mentioned, it is a privileged communication.

In my view, therefore, it is not enough that the judge should be satisfied in any given case that the publication of the defamatory matter is of service to "the common convenience and welfare of society," irrespective of the tests so laid down, of which this "common convenience and welfare of society" is the foundation and justification. He must, in addition, be of opinion that these tests have been satisfied before he can rule the occasion privileged. I think this is entirely consistent with the passage in Lord Macnaghten's judgment in *Macintosh* v. *Dun* (3) touching the protection of defamatory communications.

It was decided as long ago, I think, as *Bromage* v. *Prosser* (4), and many times since, that if one person makes an inquiry of another touching the position or character of a third, and the person inquired of makes a reply which he bona fide believes to be true, and also bona fide believes that the inquirer desires the information, not merely to gratify idle curiosity, but for some purpose in which he, the inquirer, has a legitimate interest of his own, the occasion upon which the answer is communicated to him is a privileged occasion.

(1) [1891] 2 Q. B. 346.
(2) L. R. 5 Q. B. 608, 611.
(3) [1908] A. C. 390, 399.
(4) 4 B. & C. 247.

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This will be so, I think, whether either of the beliefs so formed by the person inquired of be reasonable or not—*Clark* v. *Molyneux* (1)—and also whether the inquirer, in fact, desired the information for the purpose mentioned. It will be sufficient if the other person honestly believed he does so require it: *Waller* v. *Loch*. (2)

Now, if the person inquired of can himself reply with this protection, it necessarily follows that he can deliver his reply through the mouth of an agent duly accredited by him in that behalf, but if he does so the privilege which the agent's publication will have will be that which his principal would have had if he had replied himself. Nothing less and nothing more, since, presumably, he only gives indirectly the information which he bona fide believes to be true. If the agent should contribute anything from himself, that would alter matters entirely. So likewise may the inquirer make his inquiry through an agent, otherwise no incorporated company or municipal corporation could ever make an inquiry touching the character of a servant they were about to employ, since they can only act through and by agents. But if this latter agent should publish the information he receives by repeating it to his principal and be sued in respect of that publication, the privilege, if any, protecting him is his own. He must, I think, defend himself on the ground that, being employed as a confidential agent to obtain information for his principal, he was under a legal, moral, or social duty to his principal to repeat truly what he had been informed of.

I suppose the evidence of Hadwen may be taken to amount to a statement that he bona fide believed in the accuracy of the information conveyed by him to Shand Kydd, in reply to the latter's request or inquiry, and also bona fide believed that Shand Kydd made the inquiry for the purpose of obtaining the information on a matter in which he had a lawful interest, namely, the conduct of his own trade.

It therefore becomes necessary, in the first instance, to determine what was the precise relation in which Hadwen stood to Shand Kydd when he repeated this libel to him.

(1.) Was he the confidential agent employed by Kydd to obtain information in which he, Kydd, was interested in his trade touching the solvency of a contemplated customer; or

(1) 3 Q. B. D. 237. (2) 7 Q. B. D. 619.

(2.) Were the association as a body the confidential agents of Shand Kydd, employed by him for the same purpose, Hadwen being only a servant, aiding his employers, the association, in their work; or

(3.) Were the association as a body trading for gain in the characters of other people, and ready to sell their wares for money to any customer who asked for them, their sole motive being to gain pecuniary profit for themselves, Hadwen being, as it were, their principal shopman who took the orders of the customers and delivered the goods?

If they were this last, then they were in the same position as the defendant in *Macintosh* v. *Dun* (1), and the occasion of the publication sued on would not be privileged. But I do not think the association was in that position. It was not incorporated. It was not a legal partnership, and was not created or worked solely from motives of pecuniary gain. It was formed by men, I think, for the protection in trade, or business, of each of its members. Neither do I think the association as a body were the agents to make this inquiry.

By rule No. 2 of the rules of the association the business of the association was carried on by the committee of management. But, the association not being either a firm or an incorporated company, I do not see how it could be such an agent. And it would appear to me that the true condition of things was this, that members associated themselves together to appoint an officer, with certain machinery at his disposal, whom each member was entitled to employ as that member's own confidential agent, to obtain for him information beneficial to him in the conduct of his trade or business, the secretary, when requested to obtain the information desired, becoming pro hac vice the confidential agent of the member who asked him to procure it.

If that be the true condition of things, as in my opinion it is, then Hadwen was Kydd's confidential agent to obtain this information touching the plaintiffs' position, and, being so, he disclosed it to his principal Kydd, if not in discharge of a legal duty, certainly in discharge of a moral one.

The occasion of the publication sued on was therefore, in my

(1) [1908] A. C. 390.

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opinion, a privileged occasion, and I think the Lord Chief Justice at the trial should have so ruled.

LORD PARKER OF WADDINGTON. (1) My Lords, the irregularities which characterized the pleadings in the present case and the unusual course taken (apparently without objection from anybody) by the trial judge have, in my opinion, considerably obscured the real issue. In some cases no doubt a waiver of technical points may be conducive to substantial justice being done between the parties. In others, again, it may be dangerous if only because the dividing line between technicality and substance is not always clearly defined. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to a disregard of the principle involved.

The plaintiffs in the present case ask for damages for a libel said to be contained in a report dated April 2, 1910, and to have been communicated by all the defendants to one Shand Kydd. In other words, it is an action in which the defendants are sued as joint tort-feasors. There are three defendants, namely, (1.) Arthur Wilmshurst, (2.) the London Association for the Protection of Trade, and (3.) J. H. Hadwen. The actual communication complained of was made by Hadwen only, but he is the secretary of the association, and it is sought to make the association liable as his principal. With regard to Wilmshurst, he had supplied Hadwen with the information contained in the report, and the suggestion is that he supplied this information with a view to its communication to Shand Kydd, and is therefore also liable.

The London Association for the Protection of Trade is not a corporate body, nor is it a partnership, nor again is it a creation of statute. The plaintiffs were wrong in making it a defendant to the action. It appears, however, that the officials of the association were not anxious to raise what might be considered a technical point, and an appearance was therefore entered by Sir Samuel Scott, an official and member, on behalf of himself and all other members of the association. This, too, was wrong. Sir Samuel Scott could not properly defend on behalf of himself and all other members of the association without an order of the Court authorizing him so to do.

(1) Read by Lord Parmoor.

It may be said that this, too, was a technical matter. In my opinion, however, it was a matter of substance. Had Sir Samuel Scott applied to the Court for leave to defend on behalf of himself and all other members of the association, the Court would have had to inquire whether the case was within Order XVI., r. 9, of the Rules of the Supreme Court; in other words, whether the members of the association have a common interest within the meaning of that rule. Upon such an inquiry the nature and constitution of the association would have been of great materiality. For example, did it carry on business for gain? If so, it would be illegal, and no order recognizing its existence could be properly made. On the other hand, if it did not carry on business for gain, the question would at once arise as to the applicability of what may be referred to as the club cases. To use the words of the 8th edition of Lindley on Partnership, p. 14, "If liabilities are to be fastened on" any members of such an association "it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association." In view of such cases it would be going very far to hold that every member was liable for the tort of the secretary, even though such tort were committed in the course of carrying out the duties assigned to him under the contract between him and the persons who engaged him. In other words, there might be separate defences open to some members of the association and not to others, and if this were so there would be no common interest within the rule. Moreover, when the appearance was entered Shand Kydd was a member of the association, and, he being the person to whom the communication complained of was made, might very well contend that he could not be held liable for a communication made to himself. Lastly, if an order could have been made at all it must have been confined to authorizing Sir Samuel Scott to defend on behalf of himself and those who were members of the association at the date of the alleged libel. Those who had become members since that date could not be liable at all.

My Lords, it is obvious that these difficulties were questions of substance, and not mere technical matters which could be waived if the parties so elected. Indeed, during the hearing before your Lordships the plaintiffs were so oppressed by them that they consented

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to have the judgment, so far as the association was concerned, entirely set aside, and to proceed upon the footing that the association had never been made a defendant. This is all very well, but I cannot help thinking that if the proper course had been taken in the first instance the question of privilege which your Lordships are asked to deal with would have been formulated on quite different lines.

My Lords, there is equal cause for regret when we come to consider the course taken by the trial judge. Nothing can be clearer than that in an action for a joint tort each of the joint tortfeasors is liable for the whole damage and that there is no contribution between them. Further, a judgment against one of them precludes subsequent proceedings against the other or others. Nevertheless the learned judge appears to have asked the jury to assess the damage separately—(1.) against Wilmshurst, whom they found guilty of malice, and (2.) against Hadwen and the association, as to whom he ruled that there was no evidence of malice. The jury found 750*l.* damages against Wilmshurst and 1000*l.* damages against Hadwen and the association, but it is not clear whether they assessed the total damage at 1750*l.* and apportioned it, which they could not properly do, or whether they meant that the total damage was 1000*l.*, of which Wilmshurst, though guilty of malice, was, for some reason or other, responsible for only 750*l.* I think it not improbable that the jury were influenced in their verdict by the fact that the association admitted liability for the action of the secretary and were in possession of ample funds to satisfy the damages. The curious thing is that there appears to have been little or no evidence on which Wilmshurst could be made liable for the libel sued on at all. The information contained in Hadwen's report had been communicated by him in writing to Hadwen, and I rather gather that the learned judge thought he must be liable for this communication if not for the communication sued on, and that the fact that he was not sued on it might be disregarded as a technicality. This would account not only for the jury being asked to assess the damages separately, but for the separate judgments which after the verdict he directed to be entered (1.) against Wilmshurst, and (2.) against the association and Hadwen.

My Lords, the association and its secretary appealed to the Court of Appeal, making both plaintiffs and Wilmshurst respondents. In

their notice of appeal they asked, first, to have the verdict and judgment set aside as against them and judgment entered in their favour; failing this they asked, secondly, to have the verdict and judgment set aside either wholly or as against them, with a new trial either generally or between themselves and the plaintiffs. One of the grounds stated in the notice of appeal was that, there being no evidence of malice on their part, the communication complained of was, so far as they were concerned, a privileged communication. Another was that separate judgments ought not to have been entered. A third was that the damage found against them was excessive. The decision of the Court of Appeal turned on the first and third grounds. The Court, holding that there was no privilege, but that the damages were excessive, directed a new trial between the plaintiffs and the appellants only, leaving the judgment against Wilmshurst still standing. It is difficult, however, to see how the appellants could be made liable for anything on a new trial. The judgment against Wilmshurst would be a complete defence unless, indeed, the appellants are somehow estopped from relying on it, and I do not see how such estoppel arises.

My Lords, Hadwen and the association have now appealed to your Lordships' House. They ask your Lordships to decide the question of privilege. But if your Lordships are against them on the question of privilege, they say that they are quite content with the order of the Court of Appeal for a new trial as between themselves and the plaintiffs. They have not, therefore, made Wilmshurst a respondent to the appeal. I can hardly think it would be right to allow the case to go for a new trial as between the plaintiffs and the appellants, unless, indeed, the latter undertake not to rely on the judgment against Wilmshurst as a defence to the action, and if such an undertaking be given, I think the plaintiffs should also undertake that if they obtain judgment against the appellants on such new trial they will not enforce it to the extent of anything recovered on the judgment against Wilmshurst. I doubt, however, whether such a course, which would leave a palpable error still appearing on the face of the record, is one which your Lordships can be recommended to adopt. If there is to be a new trial as between the plaintiffs and Hadwen the judgment against Wilmshurst ought to be first discharged. There is a difficulty as to directing

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a new trial generally, at any rate, without the consent of Wilmshurst. Further, if there be a new trial as between the plaintiffs and Hadwen only, it is possible, if not probable, that any plea of privilege will be framed on different lines and supported by different evidence, and this would seem to make it undesirable for your Lordships to deal with the question of privilege on the present occasion. Both parties, however, desire your Lordships to deal with the question of privilege on the evidence as it stands, and it would be most unfortunate if the parties were obliged to recommence afresh a litigation which must already have involved them in considerable cost. I think, therefore, that under the peculiar circumstances of the case your Lordships will be justified in so far departing from the usual practice of the House as to deal with the question of privilege.

My Lords, having regard to the way in which business is carried on in this country, occasions must arise in which it is not only legitimate but necessary for one trader to inquire into the financial circumstances and credit of another. A person asked for information under such circumstances may be said to be under a social duty to communicate it, and it is in the interests of society generally that he should be able to do so without fear of an action for libel. It is therefore a principle of law that a person asked for information affecting the credit of another is justified in giving it, provided (1.) that he bona fide believes in the truth of the information which he gives; (2.) that he bona fide believes that the person making the inquiry has an interest which justifies it; and (3.), if *Macintosh* v. *Dun* (1) is to be considered good law, that he is not actuated by motives of private gain or other motives, excluding the possibility of the communication being made under a sense of social duty. Under such circumstances the implication of malice arising out of a false statement to the discredit of another is displaced and the communication is privileged.

My Lords, if a person may himself legitimately inquire as to the credit of another, it must necessarily follow that he is justified in making the inquiry through an agent confidentially employed for that purpose, and if a person asked for information may himself give it, he may give it through an agent whom he employs for that purpose. There is, however, this difference between the two cases.

(1) [1908] A. C. 390.

If a confidential agent be employed to make inquiries, he is under a legal duty to communicate the result of his inquiries to his principal, and this duty is the basis of a distinct privilege arising out of the relationship between principal and confidential agent. On the other hand, if the person from whom information is asked communicate it through an agent, the privilege of the agent is the privilege of his principal. The question therefore arises whether Hadwen was in the position of an agent confidentially employed by Shand Kydd to make inquiries on his behalf, or whether Hadwen was in a position either (1.) of a person of whom an inquiry is made, or (2.) of the agent of such last-mentioned person for the purpose of communicating the information. For the reasons hereinbefore appearing I do not think he can be held to be the agent of the association for the purpose of making the communication, and there is no evidence that any member of the association (unless it be Shand Kydd himself) made himself responsible in any way for what Hadwen did. Either, therefore, Hadwen was in the position of the person from whom the inquiry was made, or he was the confidential agent of Shand Kydd to make the inquiry and communicate the result. In the former case, there being no malice alleged, your Lordships are bound to assume that he bona fide believed in the truth of the information he gave, and also that he bona fide believed, as indeed appears from the form of inquiry made by Shand Kydd, that the latter had a legitimate interest in asking for the information. It is not alleged that Hadwen acted from motives of private gain or from any motive which is inconsistent with his having acted under a sense of social duty. To establish this it would be necessary to prove that the association was a mere sham, and that the secretary was carrying on the business of inquiring into and selling information as to the financial position of traders, the members of the association being purchasers of the information, and the real object being to secure subscriptions sufficient to pay the secretary's salary. It appears to me quite impossible for your Lordships to come to this conclusion on the evidence before you, and it follows that, on the supposition that the secretary was in the position of a person from whom inquiry was legitimately made, he was entitled to privilege.

On the other hand, if—and this I think is the true inference from the facts—the secretary was in the position of a confidential agent

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employed by Shand Kydd to make inquiries on his behalf, his report was a fortiori a privileged document, unless in making it he were guilty of actual malice, which was neither alleged nor proved. If a trader is justified in making inquiries through an agent on a proper occasion as to the credit of another, it can make no difference whether the agent receives, or does not receive, a remuneration for his services. Again, if a single trader is justified in making an inquiry through an agent, there is no reason why two or more traders so justified should not combine to pay a common agent to make, on behalf of each as occasion arises, such inquiry as may be necessary. A common agent so paid and making an inquiry at the request of any particular trader would not be the agent for that purpose of all the traders who joined in providing his salary, but only of that particular trader at whose instance the inquiry was made, just as if two persons employ a common chauffeur to drive the motor of each as required, such chauffeur would not be the agent of the one while employed in driving the car of the other. In my opinion, in making the inquiry on which the report was based and the report itself, the true inference is that Hadwen acted as confidential agent of Shand Kydd, and that the report was, therefore, a privileged communication.

In my opinion, therefore, the proper course will be to allow the appeal and enter judgment for Hadwen; and the appellant Hadwen, having obtained a decision in his favour on the only point he raised upon the appeal, is entitled to his costs here and below.

Order of the Court of Appeal, so far as complained of, reversed and judgment entered for the appellant Hadwen. The respondents to pay to the said appellant the costs incurred by him in the Courts below and also in respect of the appeal to this House.

Lords' Journals, January 31, 1916.

Solicitors for appellants: *Hutchison & Cuff.*

Solicitors for respondents: *Ford, Lloyd & Co., for Houchen, Greenland & Co., Attleborough.*

[HOUSE OF LORDS.]

EVANS (PAUPER) . . . . . APPELLANT; AND LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDINBURGH AND OTHERS . . . . . RESPONDENTS.

H. L. (SC.)*
1916
March 28.

Negligence—Road Obstruction—Door opening outwards across Pavement—Injury to Foot Passenger—Action of Damages—Liability of Owner of Door—Liability of Road Authority—Roads and Bridges (Scotland) Act, 1878 (41 & 42 *Vict. c.* 51), *ss.* 3, 94, 123; *Sched. C., s.* 105—*Edinburgh Municipal and Police Act*, 1879 (42 & 43 *Vict. c. cxxxii.*), *s.* 151.

In an action of damages against the corporation of Edinburgh and against the owners of a tenement in the city, the pursuer averred that while he was proceeding along a street which adjoined the garden wall of the tenement a door in the wall suddenly opened outwards on to the street and struck him on the face, causing him serious injuries; that the door as constructed formed an obstruction to the street; and that it constituted a grave danger to the public, and a danger which was obvious to the defenders. He averred fault against the owners for having on their premises a door of this dangerous construction; and he averred fault against the corporation in failing to remove this dangerous obstruction to the street, which he alleged they had power to do under the Roads and Bridges (Scotland) Act, 1878, ss. 3, 94, 123, and Sched. C, s. 105, and the Edinburgh Municipal and Police Act, 1879, s. 151:—

Held, that the pursuer had not stated a relevant case against the owners, because having a door opening outwards upon a street did not per se infer negligence on their part, nor against the corporation, for (1.) the door was not an obstruction to the highway within s. 151 of the Edinburgh Municipal and Police Act, 1879, which the corporation had power to remove, and (2.) the pursuer had failed to aver that the street in question was a street to which the provisions of the Roads and Bridges (Scotland) Act, 1878, applied.

Decision of the First Division of the Court of Session in Scotland, 1915 S. C. 895, affirmed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland (1) recalling an interlocutor of the Lord Ordinary.

* *Present:* LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD KINNEAR, LORD ATKINSON, and LORD PARKER OF WADDINGTON.

(1) 1915 S. C. 895.

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The appellant (hereinafter called the pursuer) raised an action against the respondents, the Lord Provost, Magistrates, and Town Council of the city of Edinburgh and Binnie and Russell (hereinafter called the defenders), for damages in respect of personal injuries sustained by him on July 6, 1914. The case made by the pursuer by his condescendence was as follows: The defenders Binnie and Russell were the owners of the property at 1, Tower Bank, Portobello. The other defenders were sued as the road authority in the city of Edinburgh, of which Portobello formed part. The property in question abutted on Ramsay Lane, Portobello, for a considerable length and was separated from it by a high wall. In this wall there was a door which gave access from the garden of the property on to the public street. A pavement which had been recently laid with granolithic skirted the wall for the whole length of the property and passed this door. The pursuer then averred as follows: "Ramsay Lane is a thoroughfare between the promenade at Portobello and the High Street of the town. It is a frequented street."

The pursuer about 1.30 on the afternoon of July 6, 1914, was proceeding with some haste along the pavement of Ramsay Lane, and was passing the property in question, when the door suddenly opened outwards, and the pursuer was struck violently on the face by it and sustained very severe injuries. The pursuer was not aware at the time of the accident that the door opened outwards. This door had for more than twenty years before the accident been so constructed that it opened outwards across the pavement, forming when open a complete obstruction to passage along the pavement. The door was a main access to the house at 1, Tower Bank and was in frequent use. As constructed at the time of the accident the door constituted a grave danger to the public and one which was obvious to the defenders. The pursuer averred fault against the owners of the property for having on their premises a door of this dangerous construction, and he averred fault against the corporation of Edinburgh in failing to remove this dangerous obstruction to the street, and he alleged that both sets of defenders were liable for the accident both at common law and by statute. As against the owners of the property the pursuer founded upon the Police and Improvement (Scotland) Act, 1862, s. 165, and the

Burgh Police (Scotland) Act, 1892, s. 161, but upon the present appeal he did not allege any statutory liability against these defenders. As against the corporation the pursuer founded on the Edinburgh Municipal and Police Act, 1879 (42 & 43 Vict. c. cxxxii.), s. 151, and the Roads and Bridges (Scotland) Act, 1878, ss. 3, 94, 123, and Sched. C, s. 105. The defenders pleaded that the averments of the pursuer were irrelevant.

The Lord Ordinary (Lord Anderson) granted an issue against both sets of defenders. He found a case relevantly averred against the owners of the property at common law but not under statute, and against the corporation of Edinburgh under the Roads and Bridges Act but not at common law; but on appeal the First Division (the Lord President, Lord Skerrington, and Lord Cullen) recalled the interlocutor of the Lord Ordinary and dismissed the action.

Constantine Gallop, for the appellant. The owners of the premises are in fault in having the door of their garden so constructed that it could be thrown open at any time by any one across the pavement in question to the obstruction of free passage thereon and to the public danger. The fact that the door may be opened in such a way as to cause no injury does not constitute a defence to an action of negligence against the owners: *Johnson* v. *Mitchell & Co.* (1) It is their duty to see that the door in its normal use is not a danger to the public: *Tarry* v. *Ashton.* (2)

As to the corporation, they are liable at common law, for it is their duty to take the highest care that the streets of the city are kept in such a state as to avoid the slightest danger to passengers; and coupled with the duty of keeping the streets safe they have the right to take proceedings against any one endangering the use of the streets: *Innes* v. *Magistrates of Edinburgh* (3); *Elgin County Road Trustees* v. *Innes* (4); Glegg on Reparation, 2nd ed., p. 327. They are also under a statutory liability. First, this door is an encroachment, obstruction, or projection upon a street within s. 151 of the Edinburgh Municipal and Police Act, 1879, the removal of which could have been ordered by the

(1) (1885) 22 S. L. R. 698.
(2) (1876) 1 Q. B. D. 314, 320.
(3) (1798) Mor. Dict. 13189.
(4) (1886) 14 R. 48.

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corporation. Secondly, the corporation are liable under the Roads and Bridges (Scotland) Act, 1878. That Act, by s. 123, incorporates s. 105 of the Turnpike Act, 1831, which is set out in Sched. C, and it extends the operation of that section to roads, highways, and bridges placed under the management of local authorities of burghs. It is true that the condescendence does not in terms state that Ramsay Lane is a highway to which the Act applies, but it says that it is a frequented street and that the magistrates are liable as the road authority. It is submitted that the point is sufficiently raised by the averments. The intention was that s. 105 should apply to the streets in a burgh, and by that section as extended no gate of any enclosure shall be made to open into any highway within the Act of 1878 or any footpath belonging thereto so as to cause an obstruction thereto, and power is given to the local authority to order the alteration of any gate which so obstructs the highway.

Clyde, D.F., and *Walter Robertson* (of the Scottish Bar), for the respondents the corporation of Edinburgh, and *Hon. William Watson, K.C.*, and *F. A. Macquisten* (both of the Scottish Bar), for the respondents the proprietors, were not called on.

LORD BUCKMASTER L.C. My Lords, in this case on July 6, 1914, as the appellant was going down Ramsay Lane, Portobello, he ran his head against a door which was suddenly opened from a house that is in the possession of two of the respondents, Messrs. Binnie and Russell. It appears that this door was a door which opened from a garden of the premises into the road, and the allegation made by the appellant with regard to its use is that it was suddenly opened on the occasion in question, that he was consequently struck violently upon the face, and I regret to say suffered grave, and it is suggested by his counsel in some respects permanent, injuries. The question is, Who is responsible for the results of this accident? It is alleged by the appellant that the owners of the premises are responsible, and also the Lord Provost and the magistrates of the city of Edinburgh. So far as the respondents Messrs. Binnie and Russell are concerned, the case against them rests upon this—that they were the owners of premises, part of which consisted of a door made to open outwards, and that

that was the possession of a dangerous structure rendering its owners liable to any person who suffered injury by reason of the door being opened across the highway.

Now it is not suggested anywhere in the condescendence in this case that the door on July 6, 1914, was opened by the respondents or by any one in their service; the claim against them begins and ends with the allegation that they were responsible for having premises which, if negligently used, might cause injury to a passer-by.

My Lords, in spite of the industry of counsel for the appellant, it has been impossible to find any authority for such a proposition as that. It is perfectly true that if a man has premises so constructed that they may become a danger to passers-by—as for example by having affixed to the premises a projecting lamp which he negligently allows to get out of repair so that it falls upon the head of a passenger—he is liable for the accident that results. But that case has no relation to the case where the premises in themselves and apart from their use are perfectly harmless, as in the present instance. The utmost that can be urged here is that the respondents own premises which, if carelessly used by the occupant, might be a cause of injury to an innocent passer-by. That is insufficient, in my opinion, to establish any liability against them for the accident that arose.

Then if that be so, the claim against the Lord Provost and magistrates of the city of Edinburgh cannot be established on the ground of their allowing premises to be in a dangerous condition at common law; it is, however, sought to render them liable by virtue of two statutes; the one is the Edinburgh Municipal and Police Act of 1879, s. 151 of which provides that "No person shall make any encroachment, obstruction, or projection in, upon, or over any street, court, foot-pavement, or footpath," and that if such obstruction is in fact made "the magistrates and council may order the removal of such encroachments, obstructions, or projections"; and every person who fails to comply with the direction of their removal shall be liable in damages. In my opinion, the words of that section have no application to a door that is normally entirely within the proper limit and boundary of the man's premises and only projects over the highway when

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it is opened. Encroachment, obstruction, and projection in that section mean something in the nature of a permanent encroachment, obstruction, or projection, something that can be removed by order of the magistrates, and failure to remove which will render the owner of the premises liable in damages. It has no relation to a door which, unless it is opened, neither encroaches on nor projects over nor obstructs the highway or footpath.

The other statute requires a little more careful consideration. It is said on behalf of the appellant that by virtue of the Roads and Bridges (Scotland) Act of 1878 there was power given to the authorities to require the removal of this door or the alteration of the premises so that the door should be permanently closed. That arises in this way. By s. 123 it is provided that certain sections, including ss. 96 to 108, of an Act passed in 1831 in the reign of William IV. should be incorporated, and from and after the commencement of the said statute should extend and apply to all highways made or to be made within any of the counties to which the statute applied, of which the county of Edinburgh is one. Now among the sections so included there is s. 105, which is set out in Sched. C to the statute, and that provides "that no gate of any park, field, or enclosure whatsoever shall be made to open into or towards any part of any turnpike road, or of any footpath belonging thereto, or be suffered so to open except the hanging post thereof shall be fixed or placed so far from the centre of any part of such road as that no part of such gate shall when open project over any part of such road or of any footpath belonging thereto"; and then there are powers given to direct the removal of the obstruction of the gate or the door and a penalty if the request for its removal is not complied with.

That section would certainly apply to the present case, if in fact Ramsay Lane were a highway within the meaning of s. 123, and for the purpose of seeing whether it is a highway or not it is necessary to examine the definition section of that statute. That section is s. 3, and it defines "highway" as including among other things certain streets. It expressly includes streets or roads that were within the burgh and were not vested at the commencement of the Act in the local authority. It does not include streets that were so vested or streets which any person

was at the commencement of the Act bound to repair at his own expense. If, therefore, it were desired to invoke the aid of that statute it would be essential to show that Ramsay Lane was a street of such a character as that it would be included in the statutory definition of a highway. The condescendence in this matter refers to this street in general terms as a frequented street, and it gives no further information as to what its character is or was—whether in 1878 it was vested in the local authority or not, and whether in 1878 any person was bound to maintain it at his own expense; in other words, the appellant has not defined this street in such a manner as to show that the provisions of the Act of 1878 apply, and consequently he is unable to obtain whatever advantage he might have derived had he been able to bring himself within the shelter of this protection.

The claim, therefore, so far as it is laid against the Lord Provost and magistrates of the city of Edinburgh fails under the statute as it failed against the owners at common law, and I only desire in conclusion to say that I must not be taken as assenting to the proposition urged on behalf of the appellant that even if this door were to be regarded as an encroachment or obstruction under the Act of 1879, or even if the street were to be taken as within the definition of a highway under the Act of 1878, it would therefore follow necessarily upon the facts as they are alleged in the condescendence that the Lord Provost and magistrates of the city of Edinburgh would be responsible for the unfortunate accident that has occurred.

VISCOUNT HALDANE. My Lords, I have very little to add. I agree with what is proposed by the noble and learned Lord on the woolsack, and with the reasons which he has given for the motion which he will propose.

The appellant seeks to make out his case on a twofold basis. In the first place he says that at common law he is entitled to succeed against the owners of the property on the ground of their breach of duty in so far as they have kept a door dangerously constructed in their wall and that he has suffered from the natural and probable consequences of keeping a door in this fashion. But, my Lords, I am far from satisfied that there was any negligence

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or dereliction of duty at common law on the part of the owners in keeping the door in this fashion. A door so made certainly could have been rightly originally so constructed. In the absence of statutory prohibition there was no reason why the door should not be made opening out on to the highway, the owners either keeping it locked or imposing such injunctions upon those who made use of it as would secure the safe opening. But it appears that in the present case some one who is not named or specified is alleged to have opened this door with undue rashness and rapidity. There is no reason why the door should have been so opened, and if it has been so opened, then I think the consequences arise, not from the door being of this structure, but from the use which has been made of it by somebody who is not shown to have been acting under the authority of the owners so as to make the maxim respondeat superior apply. For that reason I think the case fails on its common law footing.

Then, turning to the statutes, there are two statutes which are invoked. One is the Edinburgh Police Act of 1879, under which it is said that this is an obstruction of the highway. But reading the Act carefully, for the reasons which have been assigned by the Lord Chancellor, I am of opinion that this door opening outwards was not an obstruction within the meaning of that Act. An obstruction means something permanently projecting out into the highway and not a door which may or may not at any given moment be opened so as to occupy part of the space of the highway.

My Lords, the second statutory provision which was relied on was the Roads and Bridges (Scotland) Act of 1878, which was invoked for the purpose of showing that this Ramsay Lane was a highway under the control of the corporation of Edinburgh. But, my Lords, for the reasons which have been given by my noble and learned friend already, and which I need not repeat, I do not think that there are sufficient allegations in the condescendence to enable the appellant to succeed upon that part of his case. The appeal as it is presented at the Bar fails, and I will only say that I can see nothing which could have been urged by the appellant's counsel which he has failed to bring forward. I think he has said all that could be said on behalf of his client.

LORD KINNEAR. My Lords, I agree entirely with both my noble and learned friends who have preceded me, and I do not think it necessary to add anything to what they have said.

LORD ATKINSON. My Lords, I also concur. In my view this case does not fall within either of the statutes that have been mentioned, for the reasons already pointed out by my noble and learned friend on the woolsack.

As to the question at common law, negligence is a breach of duty, and to give a cause of action it must be a duty owed to the pursuer. Now what is the duty here which at common law the owners of these premises owe to the pursuer? There is no duty upon them at common law not to keep premises with a door opening on the street where that door while unopened is a perfectly harmless thing. Neither do I think that there is a duty cast upon them owing to a mere passer-by to prevent any person ever opening the door. The peculiarity of this case is that there is no averment that the person who did open the door was a person for whom the owners of the premises were in any way responsible. So that in order to succeed, inasmuch as this door is perfectly harmless if kept closed, the pursuer should show that the defenders owed a duty to him never to allow any person to open it on to the street so that it would be an obstruction. I do not think the common law attaches any such duty to the owner of premises. On these grounds I think there is no cause of action disclosed in these proceedings.

LORD PARKER OF WADDINGTON. My Lords, I agree.

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed.

Lords' Journals, March 28, 1916.

Agents for appellant: *W. Drummond Milliken, for M. Graham Yooll, S.S.C., Edinburgh.*

Agents for respondents the corporation of Edinburgh: *Beveridge, Greig & Co., for Sir Thomas Hunter, W.S., Town Clerk, Edinburgh.*

Agents for respondents Binnie and Russell: *Wetherfield, Son & Baines, for Hossack & Hamilton, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (I.)* 1916 *Feb.* 14.

KING . . . . . APPELLANT;

AND

DAVID ALLEN AND SONS, BILLPOSTING, LIMITED . . . . . RESPONDENTS.

Licence—Revocation—Assignment of Premises to which Licence was attached—Refusal of Assignee to continue Licence—Interest in Land—Licensee's Right of Action against Licensor.

By an agreement in writing dated in July, 1913, and made between the defendant, therein described as "the licensor," and the plaintiffs, therein described as "the licensees," the defendant gave the plaintiffs permission to affix posters and advertisements to the flank walls of a picture house proposed to be erected on his property by a company about to be formed, for a period of four years from November 1, 1913, or the first day the picture house should be opened for business, at a rent of 12*l.* per annum, and the defendant agreed that he would not, while the licence remained in force, permit any other person to affix any advertisement to the said walls, and would, if required by the plaintiffs, take proceedings against any person affixing advertisements thereto. By an agreement for a lease of the site dated in August, 1913, and made between the defendant and a trustee for the picture house company, the defendant agreed to assign to the trustee all his interest in the agreement of July, and the trustee agreed to obtain the ratification by the company when formed of that agreement. The company was incorporated in September, 1913, and shortly afterwards the agreement of August was ratified and the lease from the defendant to the company was executed. The lease contained no reference to the agreement of July. The company having refused the permission granted by that agreement, the licensees brought an action for damages for breach of the agreement against the licensor:—

Held, that the agreement did not create an interest in land, but created merely a personal obligation on the part of the licensor to allow the licensees the use of the wall for advertisements, and that as he had put it out of his power to fulfil his obligation under the agreement he was liable in damages for breach of contract.

Decision of the Court of Appeal in Ireland [1915] 2 I. R. 448 affirmed.

APPEAL from an order of the Court of Appeal in Ireland (1) affirming an order of the Divisional Court which affirmed a judgment of

* *Present:* LORD BUCKMASTER L.C., EARL LOREBURN, and LORD ATKINSON.

(1) [1915] 2 I. R. 448.

Gibson J. in an action for breach of a billposting agreement dated July 1, 1913. (1)

At the date of this agreement the appellant was the owner of certain premises situate at Madras Place and abutting on the Royal Canal Bank in the city of Dublin, and the respondents enjoyed the sole right and privilege, under an agreement dated November 1, 1889, and made between the predecessors of the respective parties, of using the whole of the surface wall of the premises for the purpose of exhibiting advertisements thereon at a yearly rent of 9*l*. At the date of the agreement next hereinafter mentioned the appellant was desirous of letting the lands at Madras Place to a company about to be formed for the erection thereon of a picture house, and the respondents accepted this agreement in lieu of their rights under the old agreement.

By an agreement in writing dated July 1, 1913, and made between the appellant, thereinafter called "the licensor," of the one part and the respondents, thereinafter called "the licensees," of the other part, it was agreed that the licensor thereby gave the licensees permission to affix bills, posters, and advertisements to the flank wall at side of picture house (2) proposed to be erected at Royal Canal Bank and Madras Place, Dublin, for the term of four years from November 1, 1913, or the first day said picture house should be opened for business, whichever should first happen, thereafter terminable on six months' notice by either party as therein mentioned, the licensees to pay for such permission a rent at the rate of 12*l*. per annum, payable, so long as the licence remained in force, half-yearly as therein mentioned, the first payment to be made on May 1, 1914; and the licensor agreed that he would not while the licence remained in force license or permit any other person to affix any billposting or advertisement to the said flank walls or any part thereof, and would, if required by the licensees, take proceedings against any person or persons who might during the continuance of the licence affix any billposting or advertisement to said flank walls, the licensees indemnifying the licensor against any costs or expenses connected therewith.

By an agreement dated August 29, 1913, and made between the appellant of the one part and Thomas C. Flinn, therein described as

(1) [1915] 2 I. R. 213. (2) *Sic.*

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"trustee for the Phibsboro' Picture House, Limited," then about to be incorporated and thereinafter referred to as "the new company" of the other part, the appellant agreed to let and Flinn as trustee for the new company agreed to take a lease of the said premises in Madras Place, abutting on the Royal Canal Bank, for a term of forty years from August 1, 1913, subject to the payment of the yearly rent of 117*l.* and to the terms and conditions set out in the draft lease then already prepared and on which the parties thereto had signed their names; and further that the appellant should assign to Flinn as trustee for the company all his interest in the agreement of July 1, 1913; and Flinn agreed that as soon as the new company was registered he would obtain the acceptamce and execution by the company of the lease and the ratification of the agreement of July 1, 1913.

The new company was duly incorporated under the Companies Act on September 2, 1913.

At a general meeting of the company held on September 13, 1913, it was resolved that the agreement of August 29, 1913, be ratified and adopted and that the seal of the company be affixed to the indenture of lease referred to in the agreement, and the lease was duly executed on that occasion. By this lease, which was expressed to be made between the appellant of the one part and the Phibsboro' Picture House, Limited, of the other part, the appellant demised the premises in question to the company for the term and subject to the rent above mentioned and the company covenanted to erect a picture house on the premises within one year from the date of the lease. The agreement of July 1, 1913, was not referred to in the lease, nor was any assignment of the interest of the appellant in that agreement ever made to the company.

The picture house was completed in May, 1914. In June, 1914, the respondents attempted to post their bills on the flank wall of the picture house, but were forcibly prevented by the servants of the company. The appellant, who was a director of the company, protested against the action of the company and his co-directors and did his best to have the agreement of July 1, 1913, honourably kept, but without success. Thereupon the respondents commenced the present action against the appellant. The appellant, while denying liability, applied to bring in the picture house company as third parties, but this application was ultimately refused.

Gibson J. held that the respondents were entitled to relief and assessed the damages at 80*l.*, and his judgment was affirmed first by the Divisional Court (Dodd and Madden JJ., Kenny J. dissenting) and afterwards by the Court of Appeal (O'Brien L.C. and Ronan and Molony L.JJ.).

James O'Connor, *S.-G. for Ireland*, and *St. L. Devitt* (with them *James Lardner*) (all of the Irish Bar), for the appellant. This agreement is a licence coupled with an interest and is irrevocable, and it created some interest in land. It takes effect either as the grant or lease of an easement or as a demise of the exterior surface of the wall or as a restrictive covenant, there being an implied covenant not to revoke the licence. On the document itself the intention was that the licence was to be binding on the assignee of the land taking with notice, and any burden to which the assignee of the land taking with notice is bound to submit is an interest in land. The respondents ought to have sued the picture company, and if the picture company can be sued the appellant is free, for he has committed no breach of his obligation. [They referred to *Webb* v. *Paternoster* (1); *Thomas* v. *Sorrell* (2); *James Jones & Sons* v. *Earl of Tankerville* (3); *Werderman* v. *Société Générale d'Electricité* (4); *Roffey* v. *Henderson* (5); *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (6); *Kerrison* v. *Smith* (7); *Wilson* v. *Tavener* (8); Carson's Real Property Statutes, 2nd ed., p. 36; *Tulk* v. *Moxhay* (9); *London County Council* v. *Allen* (10); *Perry* v. *Fitzhowe* (11); *Attorney-General of Southern Nigeria* v. *John Holt & Co.* (*Liverpool*) (12); *North British Ry. Co.* v. *Park Yard Co.* (13); *Wickham* v. *Hawker*. (14)]

Denis Henry, *K.C.*, and *J. Martin Whitaker* (both of the Irish Bar), for the respondents, were not called upon.

LORD BUCKMASTER L.C. My Lords, it is impossible to approach the consideration of this case without feeling and expressing great

(1) (1619) Palm. 71.
(2) (1673) Vaugh. 330, 351.
(3) [1909] 2 Ch. 440.
(4) (1881) 19 Ch. D. 246.
(5) (1851) 17 Q. B. 574, 586.
(6) [1902] 1 Ch. 146, 157.
(7) [1897] 2 Q. B. 445.
(8) [1901] 1 Ch. 578.
(9) (1848) 2 Ph. 774.
(10) [1914] 3 K. B. 642.
(11) (1846) 8 Q. B. 757, 778.
(12) [1915] A. C. 599.
(13) [1898] A. C. 643.
(14) (1840) 7 M. & W. 63.

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regret for the unfortunate position in which the appellant, Mr. King, has found himself. He seems to me to have acted throughout the whole of these transactions with perfect straightforwardness and with a sincere and anxious desire to discharge the obligation which he undertook towards David Allen & Sons, Limited; but by circumstances which have passed beyond his control there has, in my view, been a breach of his obligation to the respondents, and for that breach he must be made responsible.

The facts in this case are quite simple and free from controversy. It appears that Margaret King, the mother of the appellant, had in 1889 entered into an agreement with a man named Dillon for the use by him of a certain space for billposting. The terms of that agreement have been referred to, and counsel for the appellant directed your Lordships' attention to the fact that those terms are of such a nature that they are in themselves applicable to the constitution of the relationship of landlord and tenant. It is not, however, necessary to determine what was the true legal effect of that contract, and for these reasons: While that contract was on foot Mr. King, the appellant, in whom the property had vested, was approached, apparently by a Mr. Farrell, who was anxious to establish a picture palace company in the district. For this purpose he desired to obtain possession of the site upon which David Allen & Sons had, in succession to Mr. Dillon, the billposting rights under the previous agreement. It was desirable, therefore, that this agreement should be ended and that a new agreement should be set on foot to give David Allen & Sons, Limited, the rights that they desired in respect of premises that were then about to be built. I think it is plain that Messrs. David Allen & Sons, Limited, were well acquainted with the circumstances that then existed with regard to the use of this site, and that they knew quite well that it was intended that the company should be formed for the purpose of building upon it, thus creating a new structure to which their bills might be affixed. With this knowledge they entered into an agreement with the appellant of July 1, 1913, upon which the whole of the present dispute depends. It is an agreement which was made between the appellant of the one part and the respondents of the other, and as part of the arrangement leading up to its execution the previous agreement which had been made between

the predecessor in title of the appellant and the predecessor in title of the respondents was cancelled, and the new agreement took its place.

Now in the new agreement the appellant is referred to as licensor and the respondents as licensees. I only mention that fact for the purpose of making quite plain that I attach no importance whatever to these descriptions; they are nothing but a method of reference, and the names might just as well have been lessor and lessee as licensor and licensee. It is not upon the use of those phrases that my view of this contract in any way depends.

The agreement itself is quite short and begins with a clause which says that the appellant will grant to the respondents "permission to affix bills, posters, and advertisements to the flank wall" of the picture palace which is to be erected at the Royal Canal Bank "for a term of four years from the 1st November, 1913, or the first day said picture house shall be opened for business," and after that period of four years the document is to be capable of termination by either party on six months' written notice. The next clause provides that the respondents will pay a rent at the rate of 12*l.* per annum "so long as this license remains in force." I attach some considerable importance to this phrase; it is the description in the body of the document of what the parties intended that the document should be, and it is stated in plain language that the description of the document is that of a licence. It is not a letting or a tenancy or anything of the kind, but a licence. And the same phrase is used in a similar connection later on in the agreement, in clause 5.

My Lords, I have looked anxiously and carefully through this document to see whether it was possible to derive from its construction anything except the creation of a personal obligation between the appellant and the respondents with regard to the use of this wall, and I am unable to find it. There are two circumstances to which attention has been quite properly called by the appellant's counsel, which are no doubt important in considering what the agreement effected. The first is the fact of the rent reserved, and the next that there is a term of years granted and that arrangements are introduced into the agreement to prevent other people having competing rights with Messrs. David Allen & Sons upon this

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wall. Those considerations do not, in my opinion, necessarily conflict with the view that this is nothing but a licence—a licence for a fixed term of years, but a licence which creates no estate or interest in the land upon which the palace is going to be built, nor an easement to which the land would be thereafter subject.

Now the subsequent history of the matter is this: A company was duly incorporated on September 2, 1913, and shortly afterwards a meeting took place at which the appellant and other directors were present, and there was a discussion and consideration as to what should be done for the purpose of carrying out the arrangement upon which the whole future of the company depended, the main part of which was that a lease should be granted to the company of the site upon which the building was to stand. At that meeting a resolution was passed which adopted a prior agreement dated August 29, 1913, made by the appellant with a trustee for the company, that agreement being one by which the company were to take a lease of the premises and to take an assignment of the billposting agreement of July 1. It appears that the lease was executed; it was in proper form, but it contained no reference whatever to the rights of Messrs. Allen under the billposting agreement, and no reservation indicating upon the face of the document that any rights whatever were reserved out of the demise. In the view that I take of the document of July 1, 1913, I do not think any such reservation was necessary, for the simple reason that no such estate or interest had been created in favour of David Allen & Sons; and indeed it is plain when the documents are considered that the whole arrangement was intended to be made complete, not by any reservation in the lease, but by an assignment to the company of the benefit of the billposting agreement together with its obligations, and, for reasons which are not material, that assignment has never been completed. Had that been done all the trouble caused by this litigation would have been at an end. It undoubtedly would have bound the company not to interfere with the respondents' rights to put up their bills, and would also have rendered the company directly responsible to the appellant for any breach of their obligation not to interfere. I desire to say no more about that matter for this reason: that it may well be that there are yet rights between the appellant and the company which will enable

him to obtain against them either the execution of such further document or a declaration that they are liable to indemnify him for the wrongful act which has taken place. For what has occurred is this : The company, having entered into possession of the premises under the lease and having built the picture palace, forthwith refused to permit Messrs. David Allen & Sons to post their bills, although the company had known throughout that the lease which they had taken of the premises was a lease which had been granted by Mr. King, who had contracted with David Allen & Sons that they should possess the right of posting their bills against this wall.

My Lords, it is obviously a very undesirable thing to say any words by way of criticism of persons who are not represented before your Lordships' House, and I will therefore pass by the temptation to comment upon this action of the company, an action which appears to have been insufficiently and indeed inaccurately explained in some of their letters.

The matter then is left in this way. There is a contract between the appellant and the respondents which creates nothing but a personal obligation. It is a licence given for good and valuable consideration and to endure for a certain time. But I fail to see—although I have done my best to follow the many authorities which the learned Solicitor-General has thought it right to place before our consideration—that there is any authority for saying that any such document creates rights other than those I have described. A case of *Wilson* v. *Tavener* (1) was indeed referred to, but it really affords no assistance, for there the right conferred was to erect a hoarding upon the defendant's ground, while in the present case the sole right is to fix bills against a flank wall, and it is unreasonable to attempt to construct the relationship of landlord and tenant or grantor and grantee of an easement out of such a transaction, and I find it difficult to see how it can be reasonably urged that anything beyond personal rights was ever contemplated by the parties. Those rights have undoubtedly been taken away by the action on the part of the company, who have been enabled to prevent the respondents from exercising their rights owing to the lease granted by Mr. King, and he is accordingly liable in damages, although it

(1) [1901] 1 Ch. 578.

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was certainly not with his will, and indeed against his own express desire, that the company has declined to honour his agreement.

My Lords, for these reasons I am of opinion that this appeal must be dismissed.

EARL LOREBURN. My Lords, I agree in the opinion expressed by the Lord Chancellor, and with him I greatly regret the position in which Mr. King has been placed, which seems to me to be hard upon him. He has behaved perfectly honestly in the whole business, and one cannot help regretting the expense to which he has been put.

I have very little to add to what has been said, but I look at the case in this way. The plaintiffs say that Mr. King promised them for four years the use of a certain wall for advertising purposes by the agreement of July 1, 1913, and they say that after that Mr. King demised that land, and that Mr. King's lessees refused to make good the promise in regard to advertisement. Well, if the agreement of July 1, which purports to be on the face of it a licence, was equivalent to creating an incorporeal hereditament or a sufficient interest in land, Mr. King did not break his contract in making the lease, and would not be responsible for any trespasses that were committed by his licensees. But we must look at the document itself, and it seems to me that it does not create any interest in land at all; it merely amounts to a promise on the part of Mr. King that he would allow the other party to the contract to use the wall for advertising purposes, and there was an implied undertaking that he would not disable himself from carrying out his contract. Now Mr. King has altered his legal position in respect of his control of this land. Those to whom he granted the lease have disregarded his wishes and refused to allow his bargain to be carried out, and they have been practically enabled to do so by reason of the demise that he executed. In these circumstances it seems to me that there has been a breach in law of the contract of July 1, and Mr. King has disabled himself from giving effect to it as intended by parting with his right to present possession. That is enough to establish a case for damages against Mr. King. There may be a remedy over against the lessees. I say nothing of that, because they are not here, and I do not wish either to encourage or to dis-

courage any further proceedings; but this I think is clear: that the existence of such a remedy, if remedy there be, does not release Mr. King from his liability to answer for breaking the contract which he made.

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LORD ATKINSON. My Lords, I concur and I have nothing to add.

Order of the Court of Appeal in Ireland affirmed and appeal dismissed with costs.

Lords' Journals, February 14, 1916.

Solicitors for appellant: *Ellis, Leathley, Willes & Gavan Duffy, for John J. McDonald, Dublin.*

Solicitors for respondents: *Swepstone, Stone, Barber & Ellis, for Stewart & Orr, Dublin.*

[HOUSE OF LORDS.]

HOOLEY . . . . . APPELLANT;

AND

BUTTERLEY COMPANY, LIMITED . . . RESPONDENTS.

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Mines—Minimum Wage—"Employer"—Stallman and Holer—Butty System—Liability of Colliery Company to Holer—Coal Mines (Minimum Wage) Act, 1912 (2 *Geo.* 5, *c.* 2), *s.* 1, *sub-s.* 1.

The plaintiff, who was employed underground as a holer by a colliery company, on entering the service of the company signed an agreement whereby he agreed to serve the company on the terms of certain contract rules and empowered the company to make certain specified deductions from wages. By rule 2 of the contract rules coal was to be paid for by weight, and by rule 3, "All persons working under or for stallmen or contractors shall be deemed to be servants of the company to the extent only that they shall be bound to obey these contract rules and the other rules and regulations of the colliery." The colliery was worked on the butty system. Weekly pay checks were made out to the number of the stall showing the net total amount earned in the stall calculated upon a tonnage rate in accordance with the coal gotten, and the

* *Present:* LORD BUCKMASTER L.C., EARL LOREBURN, VISCOUNT HALDANE, and LORD ATKINSON.

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money was received by the stallman or buttyman, who handed to the holers and fillers employed in the stall wages regulated by the work done by each in accordance with the recognized rates of wages for the colliery and kept the balance for himself. Owing to hard holing the wages received from the stallman by the plaintiff, who was usually paid by piece work, were during a period of four months less than the minimum wage to which he was entitled under the Coal Mines (Minimum Wage) Act, 1912. In answer to an action in the county court by the plaintiff against the company for payment of the balance required to make up the minimum wage the company maintained, first, that they were not the employers of the plaintiff within the meaning of the Act, and, secondly, that their liability was absolved by payment to the stall of an aggregate amount sufficient to provide a minimum wage all round. The county court judge gave judgment for the plaintiff :—

Held—(1.) That there was an employment of the plaintiff by the company at wages, and that rule 3 did not apply to a person who was under an independent contract of service already the servant of the company ; (2.) (by Earl Loreburn, Viscount Haldane, and Lord Atkinson, Lord Buckmaster L.C. expressing no concluded opinion on the point), overruling *Richards* v. *Wrexham and Acton Collieries* [1914] 2 K. B. 497 on this point, that for the purposes of s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, it was not necessary that the employer should be also the paymaster of the employee ; (3.) that payment by the company to the stall of a sum sufficient to provide a minimum wage to each of the workmen under a different method of distribution was not a discharge of their obligation under the Act.

Decision of the Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal reversing an order of the Divisional Court which affirmed a judgment of the county court judge of Derbyshire in favour of the appellant, the plaintiff in an action under the Coal Mines (Minimum Wage) Act, 1912.

The respondents were the owners of the Britain Colliery in Derbyshire, and the appellant was employed as a holer in that colliery. On April 8, 1912, the appellant entered into the respondents' employment and signed a document headed "Agreement or Signing on Book," which every person employed in the colliery was bound to sign before commencing work. This document is fully set out in the judgment of the Lord Chancellor. The workmen signing this book thereby agreed to serve the respondents upon the terms of the Contract Rules printed at the commencement of

the book and subject to the general and special rules for the regulation of the mine, and each of them declared whether or not he was qualified to work alone. Each of them further empowered the respondents to make certain specified deductions from wages and to allow stoppages for fines for breach of any of the rules, and the respondents might "dismiss or prosecute any employee" for such breach instead of fining if they desired so to do.

The Contract Rules provided as follows :—

"(2.) To be paid for all coal or slack as contracted for according to the weight indicated by the pit bank machines, and to allow all improperly loaded tubs to be deducted.

"(3.) All persons working under or for stallmen or contractors shall be deemed to be servants of the company, to the extent only that they shall be bound to obey these Contract Rules and the other rules and regulations of the colliery."

The special rules provided that when a stall was at work the stallman was to take charge thereof, and he was made responsible for the safety of the stall and the workmen therein.

The appellant declared by his contract of service that he was qualified to work alone, but in fact he worked as a holer in a stall where there were two stallmen named Wragg and Slack who worked in partnership.

The respondents' collieries were worked under what is known as the butty system.

Under the butty system the stallman or buttyman receives each week from the colliery company the total amount earned in the stall calculated upon a tonnage rate in accordance with the coal gotten, and then hands to the other men employed in the stall, such as holers, fillers, and loaders, wages regulated by the work done by each in accordance with the recognized rate of wages for the colliery, and keeps the balance for himself.

Holers were usually paid by the piece, but occasionally they were paid fixed daily wages ; but in either case according to the recognized rate of wages, which was usually known as the district rate. The tonnage rate paid by the respondents, as well as the rates for other special work, was determined by a price list negotiated and agreed between the respondents and their workmen. In case of hard holing the price list provided that special arrangements

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should be made between the manager and the holer. The present dispute arose out of a case of hard holing which made it impracticable for the appellant to earn as much as the minimum wage when paid at the piece-work rate ; but no special arrangement was made to deal with this matter.

The method of payment between the respondents and their workmen was that at the end of each working week the respondents made up for each stall a pay check showing the amount and the details of the money earned, coal gotten, &c., and deductions made in respect of the workmen working in the stall, and paid over the net amount to the stallman or buttyman. The pay check for the stall in which the appellant worked was usually made out in the name of John Wragg & Co. The mode of the distribution of the wages was shown by the entries in the stallman's book.

During the weeks ending April 16, 1912, to August 13, 1912, both inclusive, the amount of the appellant's wages according to the district rate was 17*l.* 3*s.* 10*d.*, whereas under the minimum rates then in force he was entitled to the sum of 22*l.* 10*s.* 6*d.* The appellant accordingly commenced an action in the county court against the respondents for the balance of 5*l.* 6*s.* 8*d.* required to make up the minimum wage.

The respondents, while admitting that they were the employers of the appellant for some purposes, contended (1.) that they were not his employers within the meaning of s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, inasmuch as they were not under any contractual obligation to pay him wages ; and (2.) that, assuming that they were employers within the Act, they had paid to the stallmen under whom the appellant worked a sum sufficient to pay them and all the men working under them in the stall wages at the minimum rate, and that that payment exonerated them from any further liability under the Act.

The evidence at the trial showed that the respondents were the employers of the plaintiff for all purposes other than the payment of wages ; that it was the respondents who assigned to each holer his working place, and that if a stallman was dissatisfied with any of the men working in his stall he had no power to remove him, but his only remedy was to apply to the manager to have him removed.

The county court judge rejected both the contentions of the

respondents. He found as a fact that the respondents had agreed to pay the appellant for his services, and he was further of opinion that the respondents engaged their stallmen on the understanding that the latter should have any balance left out of the money paid by the respondents for coal sent up after payment to the other men in the stall of the amounts earned by them at the district rates, and that under these circumstances it was unnecessary to consider whether the amounts paid to the stallmen were sufficient to provide a minimum wage all round. He therefore gave judgment for the appellant for the amount claimed. This judgment was affirmed by the Divisional Court (Horridge and Rowlatt JJ.), but the judgment of the Divisional Court was reversed by the Court of Appeal (Swinfen Eady, Phillimore, and Bankes L.JJ.), the Lords Justices being of opinion that the case was covered by *Richards* v. *Wrexham and Acton Collieries* (1), *Higginson* v. *Blackwell Colliery Co.* (2), and *Churm* v. *Dalton Main Collieries* (3), and that the respondents were not employers within the Act.

1916. March 21. *Gordon Hewart, K.C.*, and *Ernest Charles, K.C.* (with them *S. Fleming*), for the appellant. Under all the circumstances the respondents were the employers of the appellant within the meaning of the Coal Mines (Minimum Wage) Act, s. 1, sub-s. 1. There was here a contract of employment between them and, if that is necessary, a contract of employment at wages. Upon every ground on which it is true to say the respondents are the employers of the stallmen it is equally true to say they are the employers of the holer. In *Richards* v. *Wrexham and Acton Collieries* (1) the county court judge found as a fact that the contractor was the employer of the plaintiff, but in the present case the county court judge finds that there was no contract by the stallman to pay wages to the holer, and the *Wrexham Case* (1) is distinguishable on that ground. But unless distinguishable it is wrong and ought to be overruled. The decision of this House in *Churm* v. *Dalton Main Collieries* (3) governs the present case. Rule 3 of the Contract Rules corresponds to rule 13 in the former case, except that the

(1) [1914] 2 K. B. 497.
(2) (1914) 112 L. T. 442.
(3) C. A., March 30, 1915; since reversed by the H. L., [1916] 1 A. C. 612.

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latter rule was more favourable to the colliery owners than the rule in the present case. On the question of payment the county court judge has found in the appellant's favour that the respondents have not discharged their obligation to pay him a minimum wage.

Sir Robert Finlay, K.C., and *Leslie Scott, K.C.* (with them *T. E. Ellison*), for the respondents. Under the butty system the buttyman is in the nature of a contractor. Rule 3, which must be read as part of the contract of service, negatives the idea that the holer is entitled to look to the company for his wages. The liability for wages was between the buttyman and the holer. The appellant was working under or for the buttyman within rule 3, and as soon as that appears the company is under no liability to the appellant for wages. Under this contract the relation of master and servant, outside the obligation to obey the regulations of the colliery, does not exist as between the colliery company and the appellant, and the company is not the employer for the purposes of the Act. The *Wrexham Case* (1) is in point. The Minimum Wage Act has not extended the liability to pay a minimum wage to any person who was not liable for wages before the passing of the Act. It deals not with liability but with quantum. Its object is not to impose a liability to pay wages, but to fix the minimum where the employer is already liable to pay. As to the second point, the amount paid by the company to the stall was in fact enough to pay all concerned, including the stallmen, a minimum wage, and if the aggregate amount is sufficient for that purpose the company is under no further liability.

The House adjourned consideration of the case to March 23.

March 23. LORD BUCKMASTER L.C. My Lords, in my opinion the county court judge stated in exact and concise language the true conclusion to be drawn from the facts and documents in this case. The appellant on April 8, 1912, entered the service of the respondent company for work in one of their mines, known as the Britain mine, upon conditions contained in an agreement in writing of that date. This agreement appears to have been in common form, and as its terms are important I will state them in full. They

(1) [1914] 2 K. B. 497.

are as follows: "We, the undersigned, hereby agree with the Butterley Company Limited to serve the company at their coal mines and works from the time of our signing this book upon the terms of the Contract Rules printed at the commencement of this book and subject to the observance of the general and special rules established by law for the regulation of the said mines and works and each of us declares whether or not he is qualified to work alone as required under general rule 73 of the Coal Mines Regulation Act 1911. And each of us admits that he has received a copy of the said general and special rules previously to signing this book. And each of us further agrees to have and empowers the company to make the following deductions from wages as follows: House and land rent (if a tenant), coal leading, materials supplied, repairs, contributions and levies for the sick and accident club, and hospitals (when agreed to), subscriptions to the Permanent Relief Society or to the Fatal Accident Society (if a member of either or both) and also to allow stoppages for such fines as the management of this colliery and the workmen mutually agree upon for breach of any general rule, special rule, bye-law, &c. The company may dismiss or prosecute any employee for breach of any rules, bye-laws, &c., instead of fining if they desire so to do. Signed by us at the date set opposite our respective names."

The appellant signed the form and stated that his occupation was that of a stallman. The Contract Rules referred to were six in number: the first provided that fourteen days' notice should be given to terminate the contract on either side; the second that coal should be paid for according to weight; the third was in these terms: "All persons working under or for stallmen or contractors shall be deemed to be servants of the company to the extent only that they shall be bound to obey these Contract Rules and the other rules and regulations of the colliery." The fourth was that errors on receiving cash could only be rectified if pointed out at the moment of receipt, the fifth that alterations in wages arranged by the Conciliation Board should be accepted, and the sixth that the rules might be altered. No further document of any kind was signed, and no other contract was verbally made between the appellant and any other person in connection with his work in the mine.

Although qualified to work as a stallman the appellant accepted

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the subordinate position of a holer and was put to work at a stall where there were two stallmen named Wragg and Slack. The method of payment adopted in the mine was that shown in the Contract Rules, and the sum calculated at 2*s.* 1*d.* plus 50 per cent. per ton was, in accordance with a common practice, paid week by week to Wragg, who in turn paid to the holers and fillers the amount of their earnings according to rates fixed and accepted in the colliery, the balance being retained for himself and the other stallman. Records of these payments were kept, and there is evidence to show they were from time to time furnished to the management of the colliery. For the period between April 16, 1912, and August 13, 1912, the sums earned by the appellant at the recognized rate of payment were less than the amount he was entitled to by virtue of the Minimum Wage Act, 1912, by a total sum of 5*l.* 6*s.* 8*d.* It was for that sum that the proceedings were instituted which have given rise to this appeal.

There are two defences upon which the colliery company rely: (1.) That under the Minimum Wage Act the obligation to pay the minimum wage only arises where the contract for service underground is a contract by which the employer binds himself to pay a wage; that in this case the employer was the stallman and not the company, or if the company were the employers they never employed the appellant at a wage. (2.) That the amount paid to the stallman was in fact sufficient to provide a minimum wage for all the persons concerned, and this was in any event the full extent of their obligation. The first question, therefore, is whether the appellant was in fact employed by the respondents, and I have not the least doubt that he was.

The contract of April 8, 1912, is a complete contract of service, although it omits the rate of payment by which those services were to be rewarded. That, however, is provided by clause 2 of the incorporated rules, coupled with the well-recognized and accepted rate at which the holers and fillers at this mine were entitled to receive out of that sum remuneration for their work. Apart from the provisions of clause 3 of the rules, it would not, I think, be contended that this was not the effect of the contract; but it is urged that clause 3 results in this, that in all cases where a man works for or under a stallman at a stall his relationship to the

company as a servant ceases, except so far as he is obliged to obey the rules. That is not my interpretation of the clause. It is, I think, perfectly possible that stallmen might, with the consent of the colliery company, be permitted to engage their own holers and fillers entirely apart from the company and arrange with them on their own responsibility the rate of payment for their service. If that were done the stallman would be the true employer of the men with whom he worked and he would become responsible for their minimum wage. To such men clause 3 would have a perfectly sensible application, but to read it as meaning that persons formally employed by the colliery company under the conditions of the contract in this case, conditions which provided that the colliery company should be at liberty to make deductions from wages, to make stoppage for fines, and to dismiss or prosecute "the employee," would be at one sentence to destroy the effect of the contract that had been made. It would be contrary to well-recognized canons of construction to give the clause such a meaning if its words were equally capable of another application that did not do violence to the whole structure of the contract. In my opinion, therefore, the appellant was employed by the colliery company; and it may be that this in itself is sufficient, for the employment was an employment to work underground, and it is to such a contract that the Minimum Wage Act applies; but I think also that he was employed at wages, those being the ordinary wages recognized as applicable for his work. And this, I think, is made more clear by the price list of the colliery company, which showed by article 33 that for extra hard holing special arrangements were to be made with the manager, a provision that would have no meaning if the colliery company were in no way responsible for the holer's wage.

The second point appears to me to require but brief consideration. The payments per ton handed over to the stallman were in my view to be distributed by him according to the rates of remuneration applicable to the holers and fillers, and the balance constituted the stallman's wage.

The amounts so paid were rightly and properly applied by the stallman, and, in the case of the appellant, fell short of the minimum wage by the sum that I have mentioned; as the colliery company were his employers, this deficiency they are bound to make good.

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The fact that by another method of distribution each person engaged in winning the coal might have received an amount equal to the minimum wage cannot relieve them of their obligation. I think, therefore, that the judgment of the Court of Appeal should be reversed and the award of the county court judge should be restored.

EARL LOREBURN. My Lords, I am of the same opinion. The 1st section of the Minimum Wage Act imposes a duty to pay wages to a workman not less than the minimum upon every employer unless it be in circumstances expressly mentioned in the Act itself, and the parties may not contract out of this obligation. What you have therefore to do is to find the employer, and when you have found the employer the Act applies. I respectfully differ from the Court of Appeal if the judgment given in the *Wrexham Case* (1) is understood in the sense put forward by the respondents. If the Court of Appeal meant to say that the employer is not within the Act unless he is also the paymaster, then I am unable to follow that conclusion. The payment of wages may be an element in deciding whether the relation of employer and workman exists or not, but if upon the facts of the case it appears that the relation does exist, then in my opinion it signifies nothing whether the wages are paid direct or whether there is some other indirect method or machinery for paying them. If that were not so the whole Act might be evaded simply by providing such machinery. In the present case I entertain no doubt that the respondents are the employers. The agreement says so in plain terms.

But it is true that the agreement incorporates the third contract rule, and in effect the respondents say that this rule undoes the whole effect of the agreement itself. I cannot understand that a rule so framed would have the effect of cancelling everything that is contained in the agreement itself. If the rule means that the workman shall not come within the Act although he is a workman contracting with an employer, then the rule is ultra vires and void. I think it really means that whenever the workman is not the servant of the company he shall yet be bound by the rules to a certain limited extent. In my view the Act does not create the relation

(1) [1914] 2 K. B. 497.

of employer and workman unless that relation is otherwise created; but if the relation exists, then the Act applies.

VISCOUNT HALDANE. My Lords, in this case the appellant signed a document by which he agreed with the respondents to serve them at their coal mines and works on the terms of certain Contract Rules printed in the document. There was no express stipulation for payment of wages, but there was an express stipulation that the respondents might make certain deductions from wages. The appellant was a holer in a stall under the butty system, by which the company paid the stallman a tonnage rate and he paid the holers their wages out of the money so received. The county court judge who tried the case found on the documents and the evidence that the effect was to make the stallman the agent of the holer to receive and distribute the money, but that the respondents engaged and controlled the holer and were directly liable to him for the provision of his wages. I am of opinion that there was evidence on which the county court judge could so find and that his finding must be accepted. It is said to be contrary to rule 3 annexed to his contract. This rule provides that all persons working under or for stallmen or contractors shall be deemed to be servants of the company to the extent only that they shall be bound to obey these Contract Rules and the other rules and regulations of the company. I do not, however, interpret this rule as interfering with any privity of contract which exists independently of it. I read it, not as cutting down existing liability, but as creating liability in the case of persons who are not otherwise in the contractual relation of servants of the respondents. I find no such difficulty in the way of this interpretation arising from the word "only" as was contended for at the Bar.

My Lords, I now turn to the Coal Mines (Minimum Wage) Act of 1912, on which the important question in this appeal turns. The Act provides that it is to be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall, subject to exceptions which do not apply here, pay him the minimum wage which the Act settles. The result of this legislation appears to me quite unambiguous. Parliament has decided that where a workman is employed underground in a coal mine it is to be a term of the contract of employment that the

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employer is to pay wages at not less than the minimum rate. The Act applies whenever there is such a contract of employment. It does not matter whether the employer is under the contract expressed to be liable to pay the wages or not. The statute makes him liable if he is the employer. I doubt whether the point is material in this case, but if it is I find myself unable to agree with the majority of the learned judges who decided *Richards* v. *Wrexham and Acton Collieries* (1) in the Court of Appeal. They held that the Act only applied where there was a contract to pay wages. I think that the language of the Legislature is more sweeping, and that the effect is to create a statutory obligation to pay wages even where no liability may have existed before.

In the Court of Appeal it was held in the present case that the finding of privity of contract by the county court judge was on the face of it wrong, because the third contract rule, which I have already quoted fully, excluded such privity. I have stated why I am unable to construe the rule as the Court of Appeal has construed it. If I am right and the county court judge has properly found that there was the direct relation of employers and employed between the respondents and the appellant, it disposes of the appeal. For the statute in that case obviously applies. As to the other point which was made, that the respondents discharged their statutory obligation by putting enough money into the hands of the stallmen to provide for the holers minimum wages, it is obviously a bad one.

LORD ATKINSON. My Lords, I concur. If this agreement signed by Hooley on April 8, 1912, be looked at apart for a moment from rule 3, it is in my opinion plain that Hooley entered into an agreement to serve the company as a workman underground in their coal mine; and I think his was not to be gratuitous service, because upon the face of the document itself it says that Hooley is to get wages. Who was to pay him the wages is not mentioned in the agreement; but I think a little light is thrown upon that by this, that there is a provision that the company should deduct from his wages certain things in respect of certain benefits conferred upon him, and should also deduct fines, which presumably were imposed

(1) [1914] 2 K. B. 497.

upon him at their instance ; and certainly it would be a strange construction to adopt that the man who did not pay the wages was to be entitled to make deductions from the wages paid by some person other than himself, more especially if that person be not a party to the contract at all. And I think when that agreement is taken into consideration in connection with rule 2 it is perfectly plain that this was a contract to pay Hooley wages, those wages being regulated by the mode in which the lump sum earned for their piece work would be divided between the workers who earned it according to the scale adopted by the workers themselves with the privity, and, apparently, with the consent, of the employer.

Now if he was employed as a workman the Act directly applies. It imposes upon the employer who employs him the obligation to pay him wages not less than the minimum. If the agreement can be construed in connection with the third rule, and the document be read as if that rule were embodied in it, it is perfectly clear that under these circumstances one in construing the agreement must, if possible, give effect to all its provisions, and it would be perfectly irrational, in my opinion, to hold that this rule destroyed altogether the relation created expressly by the earlier provisions of the document. If it can possibly be construed so as to reconcile it with the continuance of the relation created by its earlier provisions, it ought to be so construed. In my opinion it can be so construed, because it obviously refers to those people who may be employed in a mine—and there are many such under the Mines Regulation Act of the previous year—in regard to whom, though not servants of the colliery owner at all, an obligation is imposed upon the colliery owner to see that they conform to the rules. It is a criminal offence if he does not do all he reasonably can to make them conform to them. It appears to me that this rule was introduced to give him, as it were, greater facilities for making those people who are not his servants conform to the rules, by providing that they shall be deemed to be what theretofore they were not, namely his servants, for the purpose of the observance of those rules.

I think, therefore, that apart from the *Wrexham Case* (1) altogether this was a contract to work as a miner underground in the employers' mine for wages, but I wish emphatically to express my

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opinion that the *Wrexham Case* (1) was wrongly decided, and that the learned judges in that case were importing into the Act of Parliament a provision which is not to be found there, and is inconsistent with the provisions that are to be found there. I think that the award of the learned county court judge was correct, that the decision appealed from was erroneous and should be reversed, and this appeal should be allowed with costs.

Order of the Court of Appeal reversed and order of the King's Bench Division restored. The respondents to pay the costs in the Courts below and also the costs in respect of the appeal to this House.

Lords' Journals, March 23, 1916.

Solicitors for appellant: *King, Wigg & Brightman, for Bertram Mather, Chesterfield.*

Solicitors for respondents: *Ullithorne, Currey & Co., for C. F. Elliot Smith, Mansfield.*

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[PRIVY COUNCIL.]

THE ZAMORA.

ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(In Prize.)

J. C.
1916
April 7.

Prize Court—Powers of King in Council—Royal Prerogative—Extent to which Orders in Council are binding—Inherent Powers of the Court—Preservation of Property in Specie—Neutral Cargo—Contraband—Seizure as Prize—Requisition before Adjudication—Validity—Prize Court Rules, Order XXIX., *rr.* 1 *and* 5—*Damages—Costs.*

The Crown has no power by Order in Council to prescribe or alter the law which Prize Courts have to administer, even where that law is imperfectly ascertained and defined; but when an Order in Council mitigates the rights of the Crown in favour of enemies or neutrals it is the duty of the Prize Court to act upon it. Further, the Court will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal, and will give the utmost weight to every such Order short of treating it as a binding declaration of law. Thus, an Order declaring a blockade will prima facie justify the condemnation of vessels attempting to enter the blockaded ports, but will not preclude evidence to show that the blockade is ineffective, and therefore unlawful; and an Order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, but it will not preclude the right of the Court to hold that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable in all the circumstances of the case.

The dictum of Lord Stowell in *The Fox* (1811) Edw. 312, to the effect that the King in Council possesses legislative rights over a Prize Court analogous to those possessed by Parliament over the Courts of common law, disapproved.

The inherent power of the Prize Court to sell or realize property in its custody pending adjudication is confined to cases in which the preservation of the property is impossible or difficult.

A belligerent Power has by international law the right to requisition vessels or goods in the custody of its Prize Court, but subject to the following limitations: (*a*) the property must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security;

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* *Present:* Lord Parker of Waddington, Lord Sumner, Lord Parmoor, Lord Wrenbury, and Sir Arthur Channell.

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(*b*) there must be a real question to be tried, so that it would be improper to order immediate release; (*c*) the Prize Court must decide judicially whether, under the particular circumstances, the right is exercisable.

In proceedings to which, under the new practice in prize, the Crown, instead of the actual captors, is a party, damages and costs may be awarded against the Crown or the officer who represents the Crown.

A neutral vessel, bound to Stockholm with a contraband cargo (copper) consigned to a Swedish company, was stopped at sea by a British cruiser and taken to a British port. A writ having been issued in prize, a summons was taken out by the Procurator-General on behalf of the War Department to requisition the cargo under Order XXIX. of the Prize Court Rules, as authorized by an Order in Council of April 29, 1915. Rule 1 of Order XXIX. provides that if it is made to appear to the judge that it is desired to requisition property in the custody of the Prize Court in respect of which no final decree of condemnation has been made, he shall, upon an undertaking to pay the appraised value into Court, deliver the property to the Crown. The judge made the order accordingly :—

Held, that Order XXIX., r. 1, construed as an imperative direction to the Court, was not binding; and that, as the judge had no satisfactory evidence before him that the copper was urgently required, the order must be set aside.

Decision of the Prize Court [1916] P. 27, reversed.

APPEAL from an order of the Prize Court (England); reported [1916] P. 27.

The appeal related to a cargo of about 400 tons of copper shipped at New York on board the Swedish steamship *Zamora* by the American Smelting and Refining Company, and consigned to the appellants, the Swedish Trading Company, of Stockholm.

The *Zamora* sailed on March 20, 1915, and on April 8 was stopped by a British cruiser between the Faroe and the Shetland Isles, and a prize crew was put on board. The *Zamora* was taken to Kirkwall to be searched, and thence to Barrow-in-Furness. On April 19, 1915, a writ in prize was issued claiming a decree of condemnation of the ship and cargo on the ground that the cargo was as to more than one-half thereof contraband of war; or, in the alternative (under an Order in Council of March 11, 1915, framing "Reprisals for restricting further the commerce of Germany"), for an order for the detention and/or for the sale of the cargo, on the ground that the ship sailed from a port other than a German port after March 1,

1915, having on board cargo which had an enemy destination or was enemy property. Thenceforth the ship and cargo remained in the custody of the marshal pending the hearing of the cause upon the judgment in which their condemnation or release would depend.

At the instance of the War Department a summons was then taken out by the Procurator-General for an interlocutory order that the copper should be released and delivered up to the Crown under Order XXIX., r. 1, of the Prize Court Rules, 1914, as amended by an Order in Council of April 29, 1915, upon an undertaking to be given by the proper officer of the Crown to pay into Court the appraised value of the copper in accordance with r. 5 of the Order. (1)

The appellants objected that the provisions of Order XXIX. material to the present question violated the law of nations, and that the Prize Court ought not to act upon them.

The summons, which was adjourned into Court for argument, was heard by the President of the Probate, Divorce, and Admiralty Division (Sir Samuel Evans).

On June 14, 1915, his Lordship made an order that the copper should be released and delivered to the Crown, and reserved his statement of reasons to a subsequent date. On June 21 he gave the reasons for his decision. He held that the order could be made under the inherent powers of the Prize Court without infringing the law of nations, as well as under the powers conferred by the Order in Council under which Order XXIX. had been made, and that the appellants were not entitled to have the property retained in specie until adjudication.

(1) Order XXIX.: "(1.) Where it is made to appear to the judge on the application of the proper officer of the Crown that it is desired to requisition on behalf of His Majesty a ship in respect of which no final decree of condemnation has been made, he shall order that the ship shall be appraised, and that upon an undertaking being given in accordance with rule 5 of this Order the ship shall be released and delivered to the Crown."

"(5.) In every case of requisition under this Order an undertaking in writing shall be filed by the proper officer of the Crown for payment into Court on behalf of the Crown of the appraised value of the ship . . . . "

By Order I., r. 2, "Unless the contrary intention appears the provisions of these rules relative to ships shall extend and apply, mutatis mutandis, to goods."

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1916. Feb. 14, 15, 16, 17, 18, 28. *Sir Robert Finlay, K.C.*, and *Roche, K.C.* (*Leslie Scott, K.C.*, *Balloch*, and *Baty* with them), for the appellants. Order XXIX. does not confer the power to requisition. It is an Order regulating the procedure of the Prize Court in cases in which the power to requisition already exists. There is no right of requisition known to the law of nations in the case of neutral vessels and cargoes on the high seas brought into British territory for the purpose of adjudication by a Prize Court.

The Crown has power to requisition in time of war all property in this country belonging to British subjects or to neutrals who have brought their property here and have enjoyed the use of it subject to the protection of British law: see *In re A Petition of Right* (1), where all the authorities are reviewed, and, as to the requisitioning of British vessels, *The Broadmayne*. (2) But this prerogative right does not apply to the property of neutrals taken on the high seas. The owners of such property owe no allegiance to the Crown, and their goods are not subjected to liabilities which fall upon property voluntarily brought into the realm. Neutral property on the high seas is only liable to be brought in for adjudication. The only exception is the case of naval or victualling stores on a ship of a foreign nation intended to be carried to an enemy port. As regards such stores, by the well-recognized practice of international law—*The Haabet* (3)—and by a series of statutes dating from 1779 (19 Geo. 3, c. 69, s. 41) down to the Naval Prize Act, 1864, s. 38, the Admiralty have the right of pre-emption: see Phillimore's International Law, 3rd ed., vol. 3, p. 449.

All the cases cited in the President's judgment from Hay and Marriott's Reports (1778—1779)—*The Vrow Antoinette*, p. 142; *De Jonge Joslers*, p. 148; *Concordia Affinitatis*, p. 169; *The Sarah and Bernhardus*, p. 174; *The Hoppet*, p. 217; *Jonge Gertruyda*, p. 246; *Concordia Sophia*, p. 267; *The Drie Gebroeders*, p. 270; *The Jonge Juffers*, p. 272; and see also *The Vryheid*, ibid., p. 188—had reference to the purchase of naval stores captured on their way to an enemy port, and are no authority for the wider proposition in support of which they are cited. Further, in all these cases there had been a preliminary hearing on the ships' papers. There

(1) [1915] 3 K. B. 649.
(2) [1916] P. 64.
(3) (1800) 2 C. Rob. 174; 1 Eng. P. C. 212.

is no English authority for the proposition that a neutral vessel or cargo brought into port for adjudication can be requisitioned or sold under the doctrine of pre-emption before trial. The law is correctly laid down in the Report to the Crown dated January 18, 1753, by Sir George Lee, judge of the Admiralty Court, the Advocate-General, and the Law Officers with regard to the suspension of payment of interest on the Silesian Loan as an act of reprisal. This Report (set out in full in Collectanea Juridica, vol. 1, pp. 133 et seq., and in Sir Ernest Satow's "The Silesian Loan and Frederick the Great," Oxf. 1915) was adopted by Sir William Scott and Sir John Nicholl in 1794 in their opinion sent to Mr. Jay: see Story's Notes on the Principles and Practice of Prize Courts (Pratt's ed.), p. 1. Unless the property is perishable the neutral owner is entitled to its return in specie, if proved to be innocent. The dictum of the President that "the Court has inherent power to deal with the property brought within its jurisdiction as it may deem fit in the exercise of its discretion" cannot be substantiated.

Turning to the American cases cited in the judgment of the President, *The St. Lawrence* (1) was a case where the goods were sold generally, not to the Government, and probably because they were perishable; the decision in *The Avery* (2) turned on the question whether the marshal was entitled to fees on interlocutory sales, and the propriety of the sales was not in question; in *The Sarah and Caroline* (3) an order for sale was made upon the preliminary hearing upon the ship's papers, which proved that the cargo was enemy property, and in respect of which no appearance had been entered; in *The Memphis* (4) the point now raised was not considered; and in *The Ella Warley* (5) the goods were treated as enemy goods. In *The Stephen Hart* (6) the claimants were neutral, but the requisitioned goods consisted of military stores, and Congress took steps to strengthen the legality of the procedure by statute (Prize Act of March 3, 1863, Sess. III., c. 86, s. 2), authorizing the Secretary of the Navy or of War to take munitions of war or other material for the use of the Government. Great Britain regarded this Act as contrary to the law of nations, and

(1) (1814) 2 Gall. 19.
(2) (1814) 2 Gall. 308.
(3) (1862) Blatchford, P. C. 123.
(4) (1862) Blatchford, P. C. 202.
(5) (1862) Blatchford, P. C. 204.
(6) (1863) Blatchford, P. C. 387.

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Lord Lyons, the British Ambassador, was instructed to protest: see Official Opinions of the Attorneys-General of the United States, vol. 10, pp. 519—522.

In *The Curlew, The Magnet, &c.* (1), Dr. Croke, the vice-admiralty judge in Nova Scotia, reviewed the whole doctrine of requisition and decided against it, although, owing to the special urgency for the defence of the province, he made the order. In the present case no circumstances of imminent necessity are suggested, and the doctrine of self-preservation rests on a different basis: see Hall's International Law, 6th ed., pp. 265—266, and Chitty's Prerogatives of the Crown, p. 49.

As regards neutral property on the high seas, Order XXIX. must be read in the light of s. 38 of the Naval Prize Act, 1864, i.e., as referring to the requisition of naval and victualling stores intended to be carried to an enemy port, for it must be assumed that the Order is intended to be in accordance with the law of nations as administered in a British Prize Court: *The Fox.* (2) It is not the duty of the Court "to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction, to independent States . . . . ": per Lord Stowell in *The Maria.* (3) Municipal law, if not in accordance with international law, cannot affect neutral property brought into the Prize Court: *The Resolution* (4); see also *Le Louis* (5) and *The Annapolis and The Johanna Stoll.* (6) The passage in *Maisonnaire* v. *Keating* (7) in which Story J. says "if . . . . the Sovereign should, by a special order, authorize the capture of neutral property for a cause manifestly unfounded in the law of nations . . . . it would afford a complete justification of the captors in all tribunals of prize," refers to the sovereign legislative body and not to the King in Council, otherwise it is erroneous. The Prize Court must apply international law, and is not bound by an Order in Council if repugnant to the well-recognized principles of that law: see

(1) (1812) Stewart's Vice-Adm. Rep. (Nova Scotia) 312.
(2) Edw. 311; 2 Eng. P. C. 61.
(3) (1799) 1 C. Rob. 340, 350; 1 Eng. P. C. 152, 153.
(4) (1781) 2 Dallas (Penns.), 1.
(5) (1817) 2 Dods. 210.
(6) (1861) 30 L. J. (Adm.) 201.
(7) (1815) 2 Gall. 324, 334.

Phillimore's International Law, 3rd ed., vol. 3, p. 655, and the observations of Sir James Mackintosh in *The Minerva* (1) there mentioned. [*The Falcon* (2), *The Arabella and The Madeira* (3), and *The Franciska* (4) were also referred to.]

Sir Frederick Smith, A.-G., and *Sir George Cave, S.-G.* (*Branson* and *C. R. Dunlop* with them), for the respondent. By common law, in times of public danger, for the defence of the realm the Crown has the prerogative right of seizing for naval or military purposes all lands or chattels lawfully within the jurisdiction: *In re A Petition of Right.* (5) It is not the duty of the Court to inquire into the degree of necessity; the Court will infer that the Executive is making the requisition in the public interest, and the maxim "salus populi suprema lex" must prevail. It is admitted that the Crown can requisition the property of nationals, and neutral property in belligerent territory shares the same liability: Hall's International Law, 6th ed., p. 741. Therefore, if the *Zamora* had come into a British port in the course of trading her cargo could have been requisitioned. The right is not confined to the limited powers of pre-emption conferred by s. 38 of the Naval Prize Act, 1864. If the necessity arose vessels brought in for search could be requisitioned. Neutral property bona fide brought into a British port under suspicion cannot be in a better position than neutral property to which no suspicion attaches, already within British jurisdiction. The capture must be assumed to be lawful until the claimants establish the contrary: *The Rosalie and Betty* (6); see also Story's Notes on the Principles and Practice of Prize Courts (Pratt's ed.), p. 45, and *Hooper* v. *The United States.* (7)

Apart from Order XXIX. the Crown could requisition this cargo at common law. In *The Antares* (8) the Crown failed in its application to requisition certain copper under Order XXIX. as originally framed owing to a proviso in r. 1 which made it impossible to requisition neutral property; but the prize proceedings were abandoned and the Crown requisitioned the copper under its common law powers without question.

(1) Unreported.
(2) (1805) 6 C. Rob. 194.
(3) (1815) 2 Gall. 368.
(4) (1855) 10 Moo. P. C. 37; 2 Eng. P. C. 346.
(5) [1915] 3 K. B. 649.
(6) (1800) 2 C. Rob. 343; 1 Eng. P.C. 246.
(7) (1887) 22 Ct. of Claims, 408.
(8) (1915) 1 Br. & Col. P. C. 261

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The Prize Court must administer an Order in Council founded upon a statute unless clearly repugnant to natural justice and the settled principles of international law: *The Fox* (1); *The Invincible* (2); *The Lucy* (3); *The Providentia* (4); *Maisonnaire* v. *Keating* (5); see also Westlake's Collected Papers on Public International Law, pp. 516—518; Wheaton's International Law, 8th ed., ss. 394—396, and Dana's Note on p. 483; and 1 Blackstone's Commentaries, 16th ed., ch. 7, pp. 252 and 257. The Prize Court is a municipal Court which has to apply municipal as well as international law. There is no international right to requisition; it is the right of the Sovereign recognized by international law: see, as to the nature of international law, *West Rand Central Gold Mining Co.* v. *The King*. (6) The right to have the res preserved in specie until judgment has never been recognized in this country: see 19 Geo. 3, c. 67, s. 17, with regard to delivery of prize ships to the captor, and R. S. C. Order L., r. 2, which empowers the Court to sell not only in the case of perishable goods, but "for other good cause"; see also the cases of *Bartholomew* v. *Freeman* (7) and *The Hercules*. (8) Order XXIX. merely provides the procedure by which the marshal, who represents the King in one capacity, can deliver the goods into the custody of those who represent the King in another capacity, and by which money is substituted for the goods. No hardship is occasioned to the owners. If they had eventually been entitled to the release of their goods by the judgment of the Prize Court, under the Customs (Exportation Prohibition) Act, 1914, without licence, they would not be able to remove the goods out of the country; and after release, as neutral property in this country, the goods could be requisitioned under the Crown's common law rights without compensation. Order XXIX. is therefore a mitigation in favour of neutrals.

Further, the Order is valid as an Order in Council apart from the authority it derives from the Prize Court Act, 1894. Sect. 55 of the Naval Prize Act, 1864, expressly preserves the Royal prerogative, and the preamble to the Order in Council, after reciting that His Majesty in Council is authorized to make rules of Court for

(1) Edw. 311; 2 Eng. P. C. 61.
(2) (1814) 2 Gall. 28.
(3) (1809) Edw. 122.
(4) (1799) 2 C. Rob. 142.
(5) 2 Gall. 324.
(6) [1905] 2 K. B. 391.
(7) (1878) 3 C. P. D. 316.
(8) (1885) 11 P. D. 10.

regulating, subject to the provisions of the Naval Prize Act, 1864, and the Prize Courts Act, 1894, the procedure and practice of Prize Courts, states that His Majesty, "by virtue of the powers in this behalf by the said Act or otherwise in him vested," is pleased to order, &c. The words "or otherwise" imply that the Order can be founded on any other powers inherent in the Crown, i.e., the Royal prerogative. The Order is not in conflict with any rule of international law. The practice of requisitioning, before condemnation, neutral property seized as prize on depositing its value in Court is recognized by the United States of America: *The Memphis* (1); *The Ella Warley* (2); *The Stephen Hart.* (3) Although Lord John Russell protested against s. 2 of the Act of Congress of 1863 with regard to the taking of captured vessels, arms, or munitions for the use of the Government (see despatch from the Foreign Office to Lord Lyons, British Ambassador to the United States, April 21, 1863), the United States have continued to assert the right: see Instructions to United States Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898: "The title to property seized as prize changes only by the decision rendered by the Prize Court. But if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the Prize Court." The practice is also recognized in Germany: see an article by Dr. Albrecht in "Zeitschrift für Völkerrecht und Bundesstaatrecht," VI. Band, 1912, ss. 15 and 16; see also Selden's Mare Clausum (1663), book II., ch. xx., as to the claims once made by Great Britain to requisition in what were then regarded as territorial waters. The modern right of angary shows the nature of the control which, by common law, nations can exercise over neutral property within the jurisdiction: see Hall's International Law, 6th ed., p. 741; Phillimore, 3rd ed., vol. 3, p. 49; and the decree of the Italian Government (translated in the *London Gazette*, December 7, 1915) authorizing the requisition of foreign merchant vessels and yachts in Italian harbours.

Sir Robert Finlay, K.C., in reply. Paragraph 492 of the Instructions to United States Blockading Vessels and Cruisers is a general

(1) Blatchford, P. C. 202. (2) Blatchford, P. C. 204.
(3) Blatchford, P. C. 387.

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statement not dealing specifically with neutrals, and must be read as extending only to enemy goods and contraband. Although in olden times vessels were usually searched at sea, the practice of bringing them in for this purpose was well recognized: *Barker* v. *Blakes* (1); *The Gute Gesellschaft Michael* (2); but no case has been cited in which such vessels or their cargoes have been requisitioned. [*The Phœnix* (3), *The San José Indiano* (4), and *Bentzon* v. *Boyle* (5) were also referred to.]

Their Lordships subsequently desired to hear arguments upon the question of the right to award damages and costs.

March 21; April 5. *Sir Frederick Smith, A.-G.*, and *Sir George Cave, S.-G.* At common law the general rule is that the Crown neither gives nor receives costs: *The Queen* v. *Beadle* (6); *The King* v. *Miles* (7); *Lord Advocate* v. *Lord Dunglas* (8); *The King* v. *The Archbishop of Canterbury.* (9) Where it has been thought desirable, as a matter of fairness between the subject and the Crown, that the Crown should pay costs—e.g., where the King's Proctor intervenes in divorce suits (*Higgins* v. *The King's Proctor*, *The King's Proctor* v. *Carter* (10), but cf. as regards probate matters *Atkinson* v. *Her Majesty's Proctor* (11))—statutes have been passed to secure that object, e.g., s. 2 of the Matrimonial Causes Act, 1878. The Privy Council follows the general practice of the House of Lords: *Johnson* v. *The King.* (12) A fortiori these principles apply to prize matters. Under the old practice in prize damages and costs were only awarded against the captor where the capture had taken place without reasonable cause: *The Leucade* (13); *The Ostsee* (14); *The Actaeon* (15); *The Elize* (16); see also *The Atlantique* (17) and

(1) (1808) 9 East, 283, 292.
(2) (1801) 4 C. Rob. 94.
(3) (1803) 5 C. Rob. 20.
(4) (1814) 2 Gall. 267.
(5) (1815) 13 U. S. 191.
(6) (1857) 7 E. & B. 492.
(7) (1797) 7 T. R. 367.
(8) (1842) 9 Cl. & F. 173.
(9) [1902] 2 K. B. 503.
(10) [1910] P. 151.
(11) (1871) L. R. 2 P. & M. 255.
(12) [1904] A. C. 817.
(13) (1855) Spinks, 217; 2 Eng. P. C. 473.
(14) (1855) Spinks, 174; 2 Eng. P. C. 432.
(15) (1815) 2 Dods. 48; 2 Eng. P. C. 209.
(16) (1854) Spinks, 88; 2 Eng. P. C. 327.
(17) (1854) Spinks, 104; 2 Eng. P. C. 345.

The Neptune (1), where the claimants were condemned in the costs of the proceedings, and Story's Principles and Practice of Prize Courts (Pratt's ed.), pp. 8 and 44.

Now that captors are no longer directly interested in the prize money, under the present Prize Court Rules the Crown has been substituted for the captors as a party to the suit.

[Lord Parker of Waddington. Unless the Crown has succeeded to the position of the captors, and compensation can be awarded against the Crown either in damages or in costs, a neutral claimant is deprived of a valuable right.]

The claimant can issue a writ against the captors for damages. Damages are only awarded against the actual wrong-doer: *The Mentor* (2); and although in practice the Crown would not allow one of its officers to pay the compensation, the Crown itself cannot be liable: *Tobin* v. *The Queen* (3); nor can a Government department: *Raleigh* v. *Goschen.* (4) Alternatively, the captors may be held to be before the Court in the person of the Procurator-General, who represents them. Damages or costs, therefore, could be awarded against the captors, which in fact would be paid by the Crown, but the Prize Court Rules do not throw upon the Crown or the Procurator-General a liability which did not exist before, and no order can be made against the Procurator-General for damages or costs: see, as to the practice in admiralty, *The Duke of Sussex* (5); *The Leda.* (6) [Reference was also made to *The Elsebe* (7), and Wheaton's International Law, 8th ed., pp. 480 et seq.].

Sir Robert Finlay, K.C. The Prize Court Rules should not be construed so as to alter the rights of neutrals. Neutral claimants should have a remedy in the prize proceedings and not be left to independent action against the captors. The true position is that the Crown has condescended to take over the liability of the captors through its officer, the Procurator-General. The Rules as a whole show that the right to damages and costs was intended to be preserved and that the Crown is assuming the position of a private

(1) (1855) Spinks, 281; 2 Eng. P. C. 520.
(2) (1799) 1 C. Rob. 179; 1 Eng. P. C. 97.
(3) (1864) 16 C. B. (N. S.) 310.
(4) [1898] 1 Ch. 73.
(5) (1841) 1 W. Rob. 270.
(6) (1863) Br. & L. 19.
(7) (1804) 5 C. Rob. 174; 1 Eng. P. C. 441.

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litigant: see in particular Orders v., vi., xiii., r. 4, and xviii., r. 1. The case falls under the third head enumerated by Lord Macnaghten in *Johnson* v. *The King*. (1) The Crown is treated as a private litigant in exceptional cases where justice requires that the Crown should pay costs (or damages), or where the Crown is not unwilling to be treated as a private litigant.

April 7. The judgment of their Lordships was delivered by

Lord Parker of Waddington. On April 8, 1915, the *Zamora*, a Swedish steamship bound from New York to Stockholm with a cargo of grain and copper, was stopped by one of His Majesty's cruisers between the Faroe and Shetland Islands and taken for purposes of search first to the Orkney Islands and then to Barrow-in-Furness. She was seized as prize in the latter port on April 19, 1915, and in due course placed in the custody of the marshal of the Prize Court. It is admitted, on the one hand, that the copper was contraband of war, and, on the other hand, that the steamship was ostensibly bound for a neutral port. The question whether either steamship or cargo was lawful prize must therefore depend on whether the steamship had a concealed or ulterior destination in an enemy country, or whether the copper was by means of transhipment or otherwise, in fact, destined for the enemy.

On May 14, 1915, a writ was issued by His Majesty's Procurator-General claiming confiscation of both vessel and cargo, and on June 14, 1915, the President, at the instance of the Procurator-General, made an order under Order xxix., r. 1, of the Prize Court Rules giving leave to the War Department to requisition the copper, but subject to an undertaking being given in accordance with the provisions of Order xxix., r. 5. This appeal is from the President's order of June 14, 1915.

It will be convenient in the first place to consider the precise terms of Order xxix. of the Prize Court Rules. In so doing it must be borne in mind that though the Order in terms applies to ships only, it is by virtue of Order i., r. 2, of the Prize Court Rules equally applicable to goods. The first rule of Order xxix. provides that where it is made to appear to the judge on the application of the proper officer of the Crown that it is desired to requisition,

(1) [1904] A. C. 817.

on behalf of his Majesty, a ship in respect of which no final decree of condemnation has been made, he shall order that the ship be appraised, and upon an undertaking being given in accordance with r. 5 of the Order, the ship shall be released and delivered to the Crown. The 3rd rule of the Order provides that where in any case of requisition under the Order it is made to appear to the judge on behalf of the Crown that the ship is required for the service of His Majesty forthwith, the judge may order the same to be forthwith released and delivered to the Crown without appraisement. In such a case the amount payable by the Crown is to be fixed by the judge under r. 4 of this Order. The 5th rule of the Order provides that in every case of requisition under the Order an undertaking in writing shall be filed by the proper officer of the Crown for payment into Court on behalf of the Crown of the appraised value of the ship or of the amount fixed under r. 4 of the Order, as the case may be, at such time or times as the Court shall declare that the same or any part thereof is required for the purpose of payment out of Court.

The first observation which their Lordships desire to make on this Order is that the provisions of r. 1 are prima facie imperative. The judge is to act in a certain way whenever it is made to appear to him that it is desired to requisition the vessel or goods in question on His Majesty's behalf. If this be the true construction of the rule and the judge is, as a matter of law, bound thereby, there is nothing more to be said and the appeal must fail. If, however, it appear that the rule so construed is not, as a matter of law, binding on the judge, it will have, if possible, to be construed in some other way. Their Lordships propose, therefore, to consider in the first place whether the rule construed as an imperative direction to the judge is to any and what extent binding.

The Prize Court Rules derive their force from Orders of His Majesty in Council. These Orders are expressed to be made under the powers vested in His Majesty by virtue of the Prize Court Act, 1894, *or otherwise*. The Act of 1894 confers on the King in Council power to make rules as to the procedure and practice of the Prize Courts. So far, therefore, as the Prize Court Rules relate to procedure and practice they have statutory force and are, undoubtedly, binding. But Order XXIX., r. 1, construed as

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an imperative direction to the judge is not merely a rule of procedure or practice. It can only be a rule of procedure or practice if it be construed as prescribing the course to be followed if the judge is satisfied that according to the law administered in the Prize Court the Crown has, independently of the rule, a right to requisition the vessel or goods in question, or if the judge is minded in exercise of some discretionary power inherent in the Prize Court to sell the vessel or goods in question to the Crown. If, therefore, Order XXIX., r. 1, construed as an imperative direction be binding, it must be by virtue of some power vested in the King in Council otherwise than by virtue of the Act of 1894. It was contended by the Attorney-General that the King in Council has such a power by virtue of the Royal prerogative, and their Lordships will proceed to consider this contention.

The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity. It is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other Courts.

Prior to the Naval Prize Act, 1864, jurisdiction in matters of prize was exercised by the High Court of Admiralty, by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war. The commission no doubt owed its validity to the prerogative, but it cannot on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred. The Courts of Common Law and Equity in like manner originated in an exercise of the prerogative. The form of commission conferring jurisdiction in prize on the Court of Admiralty was always substantially the same. Their Lordships

will take that quoted by Lord Mansfield in *Lindo* v. *Rodney* (1) as an example. It required and authorized the Court of Admiralty "to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty, and the law of nations." If these words be considered, there appear to be two points requiring notice, and each of them, so far from suggesting any reason why the prerogative should extend to prescribing or altering the law to be administered by a Court of Prize, suggests strong grounds why it should not.

In the first place, all those matters upon which the Court is authorized to proceed are, or arise out of, acts done by the sovereign power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which has been duly fiated. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. It is worth while dwelling for a moment on this distinction. Of course, the Prize Court is a municipal Court, and its decrees and orders owe their validity to municipal law. The law it enforces may therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law is well defined. A Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need inquire only what that law is, but a Court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilized nations in their relations towards each other

(1) (1782) 2 Doug. 612, n., 614, n.

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or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King in Council purporting to prescribe or alter the international law, it is administering not international but municipal law; for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject. If an Order in Council were binding on the Prize Court, such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

There is yet another consideration which points to the same conclusion. The acts of a belligerent Power in right of war are not justiciable in its own Courts unless such Power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the Courts of any other Power. As is said by Story J. in the case of *The Invincible* (1), "the acts done under the authority of one Sovereign can never be subject to the revision of the tribunals of another Sovereign; and the parties to such acts are not responsible therefor in their private capacities." It follows that but for the existence of Courts of Prize no one aggrieved by the acts of a belligerent Power in times of war could obtain redress otherwise than through diplomatic channels and at the risk of disturbing international amity. An appropriate remedy is, however, provided by the fact that, according to international law, every belligerent Power must appoint and submit to the jurisdiction of a Prize Court to which any person aggrieved by its acts has access, and which administers international as opposed to municipal law—a law which is theoretically the same, whether the Court which administers it is constituted under the municipal law of the belligerent Power or of the Sovereign of the person aggrieved, and is equally binding on both parties to the litigation. It has long been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent Power cognizable in a Court of Prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the Prize Courts of the belligerent Power. A case for such intervention arises only if the decisions of those Courts are such as to amount to a gross miscarriage of

(1) 2 Gall. 28, 44.

justice. It is obvious, however, that the reason for this rule of diplomacy would entirely vanish if a Court of Prize, while nominally administering a law of international obligation, were in reality acting under the direction of the Executive of the belligerent Power.

It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the Court as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the executive orders of the King in Council.

In connection with the foregoing considerations, their Lordships attach considerable importance to the Report dated January 18, 1753, of the Committee appointed by His Britannic Majesty to reply to the complaints of Frederick II. of Prussia as to certain captures of Prussian vessels made by British ships during the war with France and Spain, which broke out in 1744. By way of reprisals for these captures the Prussian King had suspended the payment of interest on the Silesian Loan. The Report, which derives additional authority from the fact that it was signed by Mr. William Murray, then Solicitor-General, afterwards Lord Mansfield, contains a valuable statement as to the law administered by Courts of Prize. This is stated to be the law of nations, modified in some cases by particular treaties. "If," says the Report, "a subject of the King of Prussia is injured by, or has a demand upon any person here, he ought to apply to your Majesty's Courts of justice, which are equally open and indifferent to foreigner

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or native; so, vice versa, if a subject here is wronged by a person living in the dominions of His Prussian Majesty, he ought to apply for redress in the King of Prussia's Courts of justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions. The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the State, and justice absolutely denied in re minime dubia by all the tribunals and afterwards by the Prince. Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is, that justice should be impartially administered to him, as it is to the subjects of that Prince in whose Courts the matter is tried." The Report further points out that in England "the Crown never interferes with the course of justice. No order or intimation is ever given to any judge." It also contains the following statement: "All captures at sea, as prize, in time of war, must be judged of in a Court of Admiralty, according to the law of nations and particular treaties, where there are any. There never existed a case where a Court, judging according to the laws of England only, took cognizance of prize . . . . it never was imagined that the property of a foreign subject, taken as prize on the high seas, could be affected by laws peculiar to England." (1) This Report is, in their Lordships' opinion, conclusive that in 1753 any notion of a Prize Court being bound by the executive orders of the Crown, or having to administer municipal as opposed to international law, was contrary to the best legal opinion of the day.

The Attorney-General was unable to cite any case in which an Order of the King in Council had as to matters of law been held to be binding on a Court of Prize. He relied chiefly on the judgment of Lord Stowell in the case of *The Fox*. (2) The actual decision in that case was to the effect that there was nothing inconsistent with the law of nations in certain Orders in Council made

(1) See Collectanea Juridica, vol. 1, pp. 138, 147, 152.
(2) Edw. 311; 2 Eng. P. C. 61.

by way of reprisals for the Berlin and Milan Decrees, though if there had been no case for reprisals the Orders would not have been justified by international law. The decision proceeded upon the principle that, where there is just cause for retaliation, neutrals may by the law of nations be required to submit to inconvenience from the acts of a belligerent Power greater in degree than would be justified had no just cause for retaliation arisen, a principle which had been already laid down in *The Lucy*. (1)

The judgment of Lord Stowell contains, however, a remarkable passage quoted in full in the Court below, which refers to the King in Council possessing "legislative rights" over a Court of Prize analogous to those possessed by Parliament over the Courts of common law. At most this amounts to a dictum, and in their Lordships' opinion, with all due respect to so great an authority, the dictum is erroneous. It is, in fact, quite irreconcilable with the principles enunciated by Lord Stowell himself. For example, in *The Maria* (2), a Swedish ship, his judgment contains the following passage: "The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm: to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character." It is impossible to reconcile this passage with the proposition that the Prize Court is to take its law from Orders in Council. Moreover, if such a proposition were correct the Court might at any time be deprived of the right which is well recognized of determining according to law whether a blockade is rendered invalid either because it is ineffective, or because it is partial in its operation: see *The Franciska*. (3) Moreover, in *The Lucy* (1), above referred to, Lord Stowell had, in effect, refused to give effect to the Order in Council on which the captors relied.

(1) Edw. 122.
(2) 1 C. Rob. 340, 350; 1 Eng. P. C. 152, 153.
(3) 10 Moo. P. C. 37; 2 Eng. P. C. 346.

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Lord Stowell's dictum gave rise to considerable contemporaneous criticism, and is definitely rejected by Sir R. Phillimore (International Law, 3rd ed., vol. 3, s. 436). It is said to have been approved by Story J. in the case of *Maisonnaire* v. *Keating* (1), but it will be found that Story J.'s remarks, on which some reliance seems to have been placed by the President in this case, are directed not to the liability of captors in their own Courts of Prize, but to their liability in the Courts of other nations. He is in effect repeating the opinion he expressed in the case of *The Invincible* (2), to which their Lordships have already referred. An act, though illegal by international law, will not on that account be justiciable in the tribunals of another Power—at any rate, if expressly authorized by order of the Sovereign on whose behalf it is done.

Their Lordships have come to the conclusion, therefore, that, at any rate prior to the Naval Prize Act, 1864, there was no power in the Crown, by Order in Council, to prescribe or alter the law which Prize Courts have to administer. It was suggested that the Naval Prize Act, 1864, confers such a power. Under that Act the Court of Admiralty became a permanent Court of Prize, independent of any commission issued under the Great Seal. The Act, however, by s. 55, while saving the King's prerogative on the one hand, saves, on the other hand, the jurisdiction of the Court to decide judicially and in accordance with international law. Subject, therefore, to any express provisions contained in other sections, it leaves matters exactly as they stood before it was passed. The only express provisions which confer powers on the King in Council are (1.) those contained in s. 13 (now repealed and superseded by s. 3 of the Prize Court Act, 1894), conferring a power of making rules as to the practice or procedure of Prize Courts, and (2.) those contained in s. 53, conferring power to make such orders as may be necessary for the better execution of the Act.

Their Lordships are of opinion that the latter power does not extend to prescribing or altering the law to be administered by the Court, but merely to giving such executive directions as may from time to time be necessary. In all respects material to the present question the law therefore remains the same as it was before the Act, nor has it been affected by the substitution under the Supreme

(1) 2 Gall. 324. (2) 2 Gall. 28.

Court of Judicature Acts, 1873 and 1891, of the High Court of Justice for the Court of Admiralty as the permanent Court of Prize in this country.

There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the Board by the Solicitor-General. It may be, he said, that the Court would not be bound by an Order in Council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the Court should subordinate its own opinion to the directions of the Executive. This argument is open to the same objection as the argument of the Attorney-General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions.

The second point requiring notice is this. It does not follow that, because Orders in Council cannot prescribe or alter the law to be administered by the Prize Court, such Court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be. As explained in the case of *The Odessa* (1), the Crown's prerogative of bounty is unaffected by the fact that the proceeds of the Crown rights or admiralty droits are now made part of the Consolidated Fund, and do not replenish the Privy Purse. Further, the Prize Court will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such Order short of treating it as an authoritative and binding declaration of law. Thus, an Order declaring a blockade will prima facie justify the capture and condemnation of vessels attempting to enter the blockaded

(1) [1916] A. C. 145.

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ports, but will not preclude evidence to show that the blockade is ineffective and therefore unlawful. An Order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case. Further, it cannot be assumed, until there be a decision of the Prize Court to that effect, that any executive order is contrary to law, and all such orders, if acquiesced in and not declared to be illegal, will, in the course of time, be themselves evidence by which international law and usage may be established: see Wheaton's International Law, 4th English ed., pp. 25 and 26.

On this part of the case, therefore, their Lordships hold that Order XXIX., r. 1, of the Prize Court Rules, construed as an imperative direction to the Court, is not binding. Under these circumstances the rule must, if possible, be construed merely as a direction to the Court in cases in which it may be determined that, according to international law, the Crown has a right to requisition the vessel or goods of enemies or neutrals. There is much to warrant this construction, for the Order in Council, by which the Prize Court Rules were made, conforms to the provisions of the Rules Publication Act, 1893, and on reference to that Act it will be found inapplicable to Orders in Council, the validity of which depend on an exercise of the prerogative. It is reasonable, therefore, to assume that the words "or otherwise," contained in the Order in Council, refer to such other powers, if any, as the Crown possesses of making rules, and not to powers vested in the Crown by virtue of the prerogative.

The next question which arises for decision is whether the order appealed from can be justified under any power inherent in the Court as to the sale or realization of property in its custody pending decision of the question to whom such property belongs. It cannot, in their Lordships' opinion, be held that the Court has any such inherent power as laid down by the President in this case.

The primary duty of the Prize Court (as indeed of all Courts having the custody of property the subject of litigation) is to preserve the res for delivery to the persons who ultimately establish their title. The inherent power of the Court as to sale or realization is confined to cases where this cannot be done, either because the res is perishable in its nature, or because there is some other circumstance which renders its preservation impossible or difficult. In such cases it is in the interest of all parties to the litigation that it should be sold or realized, and the Court will not allow the interests of the real owner to be prejudiced by any perverse opposition on the part of a rival claimant. Such a limited power would not justify the Court in directing a sale of the res merely because it thought fit so to do, or merely because one of the parties desired the sale or claimed to become the purchaser.

It remains to consider the third, and perhaps the most difficult, question which arises on this appeal—the question whether the Crown has, independently of Order XXIX., r. 1, any and what right to requisition vessels or goods in the custody of the Prize Court pending the decision of the Court as to their condemnation or release. In arguing this question the Attorney-General again laid considerable stress on the Crown's prerogative, referring to the recent decision of the Court of Appeal in this country in *In re A Petition of Right.* (1) There is no doubt that under certain circumstances and for certain purposes the Crown may requisition any property within the realm belonging to its own subjects. But this right being one conferred by municipal law is not, as such, enforceable in a Court which administers international law. The fact, however, that the Crown possesses such a right in this country, and that somewhat similar rights are claimed by most civilized nations, may well give rise to the expectation that, at any rate in times of war, some right on the part of a belligerent Power to requisition the goods of neutrals within its jurisdiction will be found to be recognized by international usage. Such usage might be expected either to sanction the right of each country to apply in this respect its own municipal law, or to recognize a similar right of international obligation.

In support of the former alternative, which is apparently accepted

(1) [1915] 3 K. B. 649.

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by Albrecht (Zeitschrift für Völkerrecht und Bundesstaatsrecht, VI. Band, Breslau, 1912), it may be argued that the mere fact of the property of neutrals being found within the jurisdiction of a belligerent Power ought, according to international law, to render it subject to the municipal law of that jurisdiction. The argument is certainly plausible and may in certain cases and for some purposes be sound. In general, property belonging to the subject of one Power is not found within territory of another Power without the consent of the true owner, and this consent may well operate as a submission to the municipal law. A distinction may perhaps be drawn in this respect between property the presence of which within the jurisdiction is of a permanent nature and property the presence of which within the jurisdiction is temporary only. The goods of a foreigner carrying on business here are not in the same position as a vessel using an English port as a port of call. Even in the latter case, however, it is clear that for some purposes, as, for example, sanitary or police regulations, it would become subject to the lex loci. After all, no vessel is under ordinary circumstances under any compulsion to come within the jurisdiction. Different considerations arise with regard to a vessel brought within the territorial jurisdiction in exercise of a right of war. In the latter case there is no consent of the owner or of any one whose consent might impose obligations on the owner. Nevertheless, even here, she vessel might well for police and sanitary purposes become subject to the municipal law. To hold, however, that it became to subject for all purposes, including the municipal right of requisition, would give rise to various anomalies.

The municipal law of one nation in respect of the right to requisition the property of its subjects differs, or may differ, from that of another nation. The circumstances under which, the purposes for which, and the conditions subject to which the right may be exercised need not be the same. The municipal law of this country does not give compensation to a subject whose land or goods are requisitioned by the Crown. The municipal law of other nations may insist on compensation as a condition of the right. The circumstances and purposes under and for which the right can be exercised may similarly vary. It would be anomalous if the international law by which all nations are bound could only be

ascertained by an inquiry into the municipal law which prevails in each. It would be a still greater anomaly if in times of war a belligerent could, by altering his municipal law in this respect, affect the rights of other nations or their subjects. The authorities point to the conclusion that international usage has in this respect developed a law of its own, and has not recognized the right of each nation to apply its own municipal law.

The right of a belligerent to requisition the goods of neutrals found within its territory, or territory of which it is in military occupation, is recognized by a number of writers on international law. It is sometimes referred to as the right of angary, and is generally recognized as involving an obligation to make full compensation. There is, however, much difference of opinion as to the precise circumstances under which and the precise purposes for which it may be lawfully exercised. It was exercised by Germany during the Franco-German war of 1870 in respect of property belonging to British and Austrian subjects. The German military authorities seized certain British ships and sunk them in the Seine. They also seized certain Austrian rolling stock and utilized it for the transport of troops and munitions of war. The German Government offered full compensation, and its action was not made the subject of diplomatic protest, at any rate by Great Britain. In justifying the action of the military authorities with regard to the British ships, Count von Bismarck laid stress on the fact "that a pressing danger was at hand and every other method of meeting it was wanting, so that the case was one of necessity," and he referred to Phillimore's International Law, 3rd ed., vol. 3, s. 29. He did not rely on the municipal law of either France or Germany.

On reference to Phillimore it will be found that he limits the right to cases of "clear and overwhelming necessity." In this he agrees with De Martens, who speaks of the right existing only in cases of "extreme necessity" (Law of Nations, book vi., s. 7), and with Gessner, who says the necessity must be real; that there must be no other means less violent "de sauver l'existence," and that neither the desire to injure the enemy nor the greatest degree of convenience to the belligerent is sufficient (Le Droit des Neutres, p. 154, 2nd ed., Berlin, 1876). It is difficult to see how the acts of

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the German Government to which reference has been made come within the limits thus laid down. It might have been convenient to Germany and hurtful to France to sink English vessels in the Seine or to utilize Austrian rolling stock for transport purposes, but clearly no extreme necessity involving actual existence had arisen. Azuni, on the other hand (Droit maritime de l'Europe, vol. 1, ch. iii., art. 5, p. 292), thought that an exercise of the right would be justified by necessity or public utility; in other words, that a very high degree of convenience to the belligerent Power would be sufficient. Germany must be taken to have asserted and England and Austria to have acquiesced in the latter view, which is the view taken by Bluntschli (Droit International, s. 795 bis) and in the only British prize decision dealing with this point.

The case to which their Lordships refer is that of *The Curlew, The Magnet, &c.* (1) The ships in question, with their cargoes, had been seized by the British authorities as prize in the early days of the war with the United States of America, which broke out in 1812, and had been brought into port for adjudication. The Lieutenant-Governor of the province and the Admiral and Commander-in-Chief of His Majesty's ships on that station thereupon presented a petition for leave to requisition some of the ships and parts of the cargoes pending adjudication. In his judgment Dr. Croke lays it down that though as a rule the Court has no power of selling or bartering vessels or goods in its custody, prior to adjudication, to any departments of His Majesty's service, nevertheless there may be cases of necessity in which the right of self-defence supersedes and dispenses with the usual modes of procedure. He held that such a case had in fact arisen, and accordingly granted the prayer of the petitioners: (1.) as to certain small arms "very much and immediately needed for the defence of the province"; (2.) as to certain oak timbers of which there was "great want" in His Majesty's naval yard at Halifax; and (3.) as to a vessel immediately required for use as a prison ship. The appraised value of the property requisitioned was in each case ordered to be brought into Court.

It should be observed that with regard to ships and goods of neutrals in the custody of the Prize Court for adjudication there

(1) Stewart's Vice-Adm. Rep. (Nova Scotia) 312.

are special reasons which render it reasonable that the belligerent should in a proper case have the power to requisition them. The legal property or dominion is, no doubt, still in the neutral, but ultimate condemnation will vest it in the Crown, as from the date of the seizure as prize, and meanwhile all beneficial enjoyment is suspended. In cases where the ships or the goods are required for immediate use, this may well entail hardship on the party who ultimately establishes his title. To mitigate the hardship in the case of a ship a custom has arisen of releasing it to the claimant on bail, that is, on giving security for the payment of its appraised value. It may well be that in practice this was never done without the consent of the Crown, but such consent would not be likely to be withheld, unless the Crown itself desired to use the ship after condemnation. The 25th section of the Naval Prize Act, 1864, now confers on the judge full discretion in the matter. This being so, it is not unreasonable that the Crown on its side should in a proper case have power to requisition either vessel or goods for the national safety. It must be remembered that the neutral may obtain compensation for loss suffered by reason of an improper seizure of his vessel or goods, but the Crown can never obtain compensation from the neutral in respect of loss occasioned by a claim to release which ultimately fails.

The power in question was asserted by the United States of America in the Civil War which broke out in 1861. In *The Memphis* (1), in *The Ella Warley* (2), and in *The Stephen Hart* (3) Betts J. allowed the War Department to requisition goods in the custody of the Prize Court and required for purposes in connection with the prosecution of the war. In the case of *The Peterhoff* (4) he allowed the vessel itself to be similarly requisitioned by the Navy Department. The reasons of Betts J., as reported, are not very satisfactory, for they leave it in doubt whether he considered the right he was enforcing to be a right according to the municipal law of the United States overriding the international law, or to be a right according to the international law. But his decisions were not appealed, nor does it appear that they led to any diplomatic protest.

(1) Blatchford, P. C. 202.
(2) Blatchford, P. C. 204.
(3) Blatchford, P. C. 387.
(4) (1863) Blatchford, P. C. 381.

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On March 3, 1863, after the decisions above referred to, the United States Legislature passed an Act (Congress, 1863, Sess. III., c. 86) whereby it was enacted (s. 2) that the Secretary of the Navy or the Secretary of War should be and they or either of them were thereby authorized to take any captured vessel, any arms or munitions of war, or other material for the use of the Government, and when the same should have been taken, before being sent in for adjudication or afterwards, the Department for whose use it was taken should deposit the value of the same in the Treasury of the United States, subject to the order of the Court in which prize proceedings might be taken, or, if no proceedings in prize should be taken, to be credited to the Navy Department and dealt with according to law.

It is impossible to suppose that the United States Legislature in passing this Act intended to alter or modify the principles of international law in its own interest or against the interest of neutrals. On the contrary, the Act must be regarded as embodying the considered opinion of the United States authorities as to the right possessed by a belligerent to requisition vessels or goods seized as prize before adjudication. Nevertheless, their Lordships regard the passing of the Act as somewhat unfortunate from the standpoint of the international lawyer. In the first place, it seems to cast some doubt upon the decisions already given by Betts J. In the second place, it tends to weaken all subsequent decisions of the United States Prize Courts on the right to requisition vessels or goods, as authorities on international law, for these Courts are bound by the provisions of the Act, whether it be in accordance with international law or otherwise. In the third place, their Lordships are of opinion that the provisions of the Act go beyond what is justified by international usage. The right to requisition recognized by international law is not, in their opinion, an absolute right, but a right exercisable in certain circumstances and for certain purposes only. Further, international usage requires all captures to be brought promptly into the Prize Court for adjudication, and the right to requisition, therefore, ought as a general rule to be exercised only when this has been done. It is for the Court, and not the Executive of the belligerent State, to decide whether the right claimed can be lawfully exercised in any particular case.

It appears that the British Government, shortly after the Act was passed, protested against the provisions of the 2nd section. The grounds for such protest appear in Lord Russell's despatch of April 21, 1863. The first is the primary duty of the Court to preserve the subject-matter of the litigation for the party who ultimately establishes his title. In stating it Lord Russell ignores, and (having regard to the provisions of the section) was probably entitled to ignore, all exceptional cases based on the right of angary. The second ground is that such a general right as asserted in the section would encourage the making of seizures, known at the time when they are made to be unwarrantable by law, merely because the property seized might be useful to the belligerent. This objection is more serious, but it derives its chief force from the fact that the right asserted in the section can be exercised before the property seized is brought into the Prize Court for adjudication, and, even when it has been so brought in, precludes the judge from dealing judicially with the matter. If the right accorded by international law to requisition vessels or goods in the custody of the Court be exercised through the Court and be confined to cases in which there is really a question to be tried, and the vessel or goods cannot, therefore, be released forthwith, the objection is obviated.

It further appears that the United States took the opinion of their own Attorney-General on the matter (Opinions of Attorneys-General of the United States, vol. 10, p. 519), and were advised that there was no warrant for the section in international law, and that it would not be advisable to put it into force in cases where controversy was likely to arise. The Attorney-General did not, any more than Lord Russell, refer to exceptional cases based on the right of angary, but dealt only with the provisions of the section as a whole.

Some stress was laid in argument on the cases cited in the judgment in the Court below upon what is known as "the right of pre-emption," but in their Lordships' opinion these cases have little if any bearing on the matter now in controversy. The right of pre-emption appears to have arisen in the following manner: According to the British view of international law, naval stores were absolute contraband, and if found on a neutral vessel bound for an enemy port were lawful prize. Other countries contended that such

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stores were only contraband if destined for the use of the enemy Government. If destined for the use of civilians they were not contraband at all. Under these circumstances the British Government, by way of mitigation of the severity of its own view, consented to a kind of compromise. Instead of condemning such stores as lawful prize, it bought them out and out from their neutral owners, and this practice, after forming the subject of many particular treaties, at last came to be recognized as fully warranted by international law. It was, however, always confined to naval stores, and a purchase pursuant to it put an end to all litigation between the Crown on the one hand and the neutral owner on the other. Only in cases where the title of the neutral was in doubt and the property might turn out to be enemy property was the purchase-money paid into Court. It is obvious, therefore, that this "right of pre-emption" differs widely from the right to requisition the vessels or goods of neutrals, which is exercised without prejudice to, and does not conclude or otherwise affect, the question whether the vessel or goods should or should not be condemned as prize.

On the whole question their Lordships have come to the following conclusion: A belligerent Power has by international law the right to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

With regard to the first of these limitations, their Lordships are of opinion that the judge ought, as a rule, to treat the statement on oath of the proper officer of the Crown to the effect that the vessel or goods which it is desired to requisition are urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security, as

conclusive of the fact. This is so in the analogous case of property being requisitioned under the municipal law (see Warrington L.J. in the case of *In re A Petition of Right* (1), already cited), and there is every reason why it should be so also in the case of property requisitioned under the international law. Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public.

With regard to the second limitation, it can be best illustrated by referring to the old practice. The first hearing of a case in prize was upon the ship's papers, the answers of the master and others to the standing interrogatories and such special interrogatories as might have been allowed, and any further evidence which the judge, under special circumstances, thought it reasonable to admit. If, on this hearing, the judge was of opinion that the vessel or goods ought to be released forthwith, an order for release would in general be made. A further hearing was not readily granted at the instance of the Crown. If, on the other hand, the judge was of opinion that the vessel or goods could not be released forthwith, a further hearing would be granted at the instance of the claimant. It the claimant did not desire a further hearing, the vessel or goods would be condemned. This practice, though obviously unsuitable in many respects to modern conditions, had the advantage of demonstrating at an early stage of the proceedings whether there was a real question to be tried, or whether there ought to be an immediate release of the vessel or goods in question. In their Lordships' opinion, the judge should, before allowing a vessel or goods to be requisitioned, satisfy himself (having regard of course to modern conditions) that there is a real case for investigation and trial, and that the circumstances are not such as would justify the immediate release of the vessel or goods. The application for leave to requisition must, under the existing practice, be an interlocutory application, and, in view of what has been said, it should be supported by evidence sufficient to satisfy the judge in this respect. In this manner Lord Russell's objection as to the encouragement of unwarranted seizures is altogether obviated.

(1) [1915] 3 K. B. 666.

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With regard to the third limitation, it is based on the principle that the jurisdiction of the Prize Court commences as soon as there is a seizure in prize. If the captors do not promptly bring in the property seized for adjudication, the Court will at the instance of any party aggrieved compel them so to do. From the moment of seizure the rights of all parties are governed by international law. It was suggested in argument that a vessel brought into harbour for search might, before seizure, be requisitioned under the municipal law. This point, if it ever arises, would fall to be decided by a Court administering municipal law, but from the point of view of international law it would be a misfortune if the practice of bringing a vessel into harbour for the purpose of search—a practice which is justifiable because search at sea is impossible under the conditions of modern warfare—were held to give rise to rights which could not arise if the search took place at sea.

It remains to apply what has been said to the present case. In their Lordships' opinion the order appealed from was wrong, not because, as contended by the appellants, there is by international law no right at all to requisition ships or goods in the custody of the Court, but because the judge had before him no satisfactory evidence that such a right was exercisable. The affidavit of the Director of Army Contracts, following the words of Order XXIX., r. 1, merely states that it is desired on behalf of His Majesty to requisition the copper in question. It does not state that the copper is urgently required for national purposes. Further, the affidavit of Sven Hoglund, which is unanswered, so far from showing that there was any real case to be tried, suggests a case for immediate release. Under these circumstances the normal course would be to discharge the order appealed from without prejudice to another application by the Procurator-General supported by proper evidence. But the copper in question has long since been handed over to the War Department, and, if not used up, at any rate cannot now be identified. No order for its restoration can therefore be made, and it would be wrong to require the Government to provide other copper in its place. Under the old procedure the proper course would have been to give the appellant, in case his claim to the copper be ultimately allowed, leave to apply to the Court for any damage he may have suffered by reason of its having been taken by the Government under the order.

It was, however, suggested that the procedure prescribed by the existing Prize Court Rules precludes the possibility of the Court awarding damages or costs in the existing proceedings. Under the old practice the captors were parties to every proceeding for condemnation, and damages and costs could in a proper case have been awarded as against them. But every action for condemnation is now instituted by the Procurator-General on behalf of the Crown, and the captors are not necessarily parties. It is said that neither damages nor costs can be awarded against the Crown. It is not suggested that the persons entitled to such damages or costs are deprived of all remedy, but it is urged that in order to recover either damages or costs, if damages or costs are claimed, they must themselves institute fresh proceedings as plaintiffs, not against the Crown but against the actual captors. This result would, in their Lordships' opinion, be extremely inconvenient, and would entail considerable hardship on claimants. If possible, therefore, the Prize Court Rules ought to be construed so as to avoid it, and, in their Lordships' opinion, the Prize Court Rules can be so construed.

It will be observed that, by Order I., r. 1, the expression " captor " is, for the purposes of proceedings in any cause or matter, to include " the proper officer of the Crown," and " the proper officer of the Crown " is defined as the King's Proctor or other law officer or agent authorized to conduct prize proceedings on behalf of the Crown within the jurisdiction of the Court.

It is provided by Order II., r. 3, that every cause instituted for the condemnation of a ship or (by virtue of Order I., r. 2) goods shall be instituted in the name of the Crown, though the proceedings therein may, with the consent of the Crown, be conducted by the actual captors. By Order II., r. 7, in a cause instituted against the " captor " for restitution or damages the writ is to be in the Form No. 4 of Appendix A. This would appear to contemplate that an action for damages can be instituted against the proper officer of the Crown, any argument to the contrary, based upon the form of writ as originally framed, being rendered invalid by the alterations in such form introduced by rule No. 5 of the Prize Court Rules under the Order in Council dated March 11, 1915. It is not, however, necessary to decide this point.

Order V. provides for proceedings in case of failure to proceed

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by captors. Under rr. 1 and 2, which contemplate the case of no proceedings having been yet instituted, the claimant must issue a writ, and can then apply for relief by way of restitution, with or without damages and costs. It does not appear against whom the writ is to be issued, whether against the actual captors or the proper officer of the Crown who ought to have instituted proceedings. Under r. 3, however, which contemplates that proceedings have been instituted, it is provided that, if the captors (which, in the case of an action for condemnation, must of course mean the proper officer of the Crown) fail to take any steps within the respective times provided by the rules, or, in the opinion of the judge, fail to prosecute with effect the proceedings for adjudication, the judge may, on the application of a claimant, order the property to be released to the claimant, and may make such order as to damages or costs as he thinks fit. This rule, therefore, distinctly contemplates that the Crown or its proper officer may be made liable for damages or costs. Neither damages nor costs could be awarded against persons who were not parties to the proceedings, and it can hardly have been the intention of the rules to make third parties liable for the default of those who were actually conducting the proceedings.

By Order VI. proceedings may be discontinued by leave of the judge, but such discontinuance is not to affect the right, if any, of the claimant to costs and damages. This again contemplates that in an action for condemnation the claimant may have a right to costs and damages, and, as the Crown is the only proper plaintiff in such an action, to costs and damages against the Crown.

Order XIII. is concerned with releases. They are to be issued out of the registry and, except in the six cases referred to in r. 3, only with the consent of the judge. One of the excepted cases is when the property is the subject of proceedings for condemnation, that is, of proceedings in which the Crown by its proper officer is plaintiff, and when a consent to restitution signed by the captor (again by the proper officer of the Crown) has been filed. Another excepted case is when proceedings instituted by or on behalf of the Crown are discontinued. By r. 4 no release is to affect the right of any of the owners of the property to costs and damages against the "captor," unless so ordered by the judge. In the cases last

referred to "captor" must again mean the proper officer who is suing on behalf of the Crown.

Order XLIV. deals with appeals, and provides that in every case the appellant must give security for costs to the satisfaction of the judge. In cases of appeals from a condemnation, or in other cases in which the Crown by its proper officer would be a respondent, this provision could serve no useful purpose unless costs could be awarded in favour of the Crown, and, if costs can be awarded in favour of, it follows that they can similarly be awarded against the Crown.

It is to be observed that, unless the judgment or order appealed from be stayed pending appeal, r. 4 of this Order contemplates that persons in whose favour it is executed will give security for the due performance of such Order as His Majesty in Council may think fit to make. Their Lordships were not informed whether such security was given in the present case.

In their Lordships' opinion, these rules are framed on the footing that where the Crown by its proper officer is a party to the proceedings it takes upon itself the liability as to damages and costs to which under the old procedure the actual captors were subject. This is precisely what might be expected, for otherwise the rules would tend to hamper claimants in pursuing the remedies open to them according to international law. The matter is somewhat technical, for even under the old procedure the Crown, as a general rule, in fact defrayed the damages and costs to which the captors might be held liable. The common law rule that the Crown neither paid nor received costs is, as pointed out by Lord Macnaghten in *Johnson* v. *The King* (1), subject to exceptions.

Their Lordships, therefore, have come to the conclusion that, in proceedings to which under the new practice the Crown instead of the actual captors is a party, both damages and costs may in a proper case be awarded against the Crown or the officer who in such proceedings represents the Crown.

The proper course, therefore, in the present case, is to declare that upon the evidence before the President he was not justified in making the order the subject of this appeal, and to give the appellants leave, in the event of their ultimately succeeding in the

(1) [1904] A. C. 817.

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proceedings for condemnation, to apply to the Court below for such damages, if any, as they may have sustained by reason of the order and what has been done under it. Their Lordships will humbly advise His Majesty accordingly; but inasmuch as the case put forward by the appellants has succeeded in part only, they do not think that any order should be made as to the costs of the appeal.

Solicitors for appellants: *Botterell & Roche.*
Solicitor for respondent: *The Treasury Solicitor.*

E. C. T.

[PRIVY COUNCIL.]

J. C.* 1916 *April* 7.

THE GUTENFELS.

ON APPEAL FROM H.B.M. SUPREME COURT FOR EGYPT.

(IN PRIZE.)

Prize Court—Enemy Ship—Use of Suez Canal Port as Port of Refuge—Permission to leave—No Offer of Pass—Seizure—Status of Port Said—Convention VI. of the Hague Convention of 1907, *arts.* 1 *and* 2*—Attitude of Germany—Reciprocal Obligations—Detention—Form of Order.*

Art. 1 of Convention VI. of the Hague Convention of 1907 provides that "when a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to the port of destination or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out." Art. 2 provides that "a merchant-ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the previous article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of

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* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR SAMUEL EVANS.

compensation, or he may requisition it on condition of paying compensation."

A German merchant ship arrived at Port Said on August 5, 1914, in ignorance that hostilities had broken out between Great Britain and Germany. From August 5 to August 14 she was not free to leave, but on August 14 she was told that she could go if she liked. She neither asked for, nor was offered, a pass, and remained in port until October 13, when the Egyptian Government took possession of her. On October 16 she was taken out to sea and conducted to a British cruiser, which seized her as prize. These events took place before war was declared between Great Britain and Turkey and before Egypt had been declared a British Protectorate :—

Held, first, that after the outbreak of war between Great Britain and Germany Port Said, as regards Germany, was an enemy port; secondly, assuming that the Convention applied to Egypt and was operative at the time, that the question whether art. 2 or any part of it was obligatory, or whether, if the course referred to as "desirable" in art. 1 were not taken, art. 2 had any application to an enemy vessel which found itself in an enemy port at the outbreak of hostilities, or which subsequently entered without knowledge of the outbreak of hostilities, was a question of law arising on an international document involving a reciprocal obligation performable only at the end of the war.

Held, therefore, that the vessel must be detained until further order, leaving the ultimate rights between the parties to be determined after the war.

Judgment of H.B.M. Supreme Court for Egypt, which had made an order for the detention of the vessel during the war and restoration to her owners at its conclusion, varied, and an order for detention until further order, in the terms of the order in *The Chile* [1914] P. 217, substituted.

Appeal from H.B.M. Supreme Court for Egypt.

The German steamship *Gutenfels*, of 5528 tons gross register, belonging to the Hansa Line, in the course of a voyage from Antwerp to Bombay and Karachi with a general cargo, arrived at Port Said on August 5, 1914, in ignorance that war had broken out between Great Britain and Germany. She was boarded by the captain of the port, and her master was ordered to take down the antennae of her wireless apparatus. From August 5 to August 14 the vessel was not free to leave, but on August 14 she was informed that she could leave if she liked. She neither asked for nor was offered a pass, and continued to remain, using the port as a port of refuge, until October 13, when she was boarded by an officer of the Egyptian

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army, and the master was informed that the Egyptian Government had taken the vessel. A new captain and crew were put on board, and on October 16 the *Gutenfels* was taken out to sea and conducted to H.M.S. *Warrior*, who seized her as prize and took her to Alexandria.

The Egyptian Prize Court held that, as a British Prize Court, the Court was bound by the Hague Convention No. VI., and that as the *Gutenfels* had not been offered a pass to a neutral port she could only be detained during the war and not confiscated, and that at the conclusion of the war she must be restored or her value paid to the owners.

Arts. 1 and 2 of Convention VI. are fully set out in the head-note.

The Procurator-General, on behalf of the Crown, appealed.

1916. March 10, 13, 14, 16. *Sir Frederick Smith, A.-G.*, and *Sir George Cave, S.-G.* (*Stuart Bevan, Pearce Higgins*, and *C. R. Dunlop* with them), for the appellant. Before the outbreak of war between Great Britain and Turkey on November 5, 1914, in theory Egypt was a vassal State of Turkey. But since 1888, when the military occupation of Egypt began, the technical sovereignty of Turkey gradually decreased (see Westlake's International Law, part ii., p. 26), and after the outbreak of war between Great Britain and Germany Egypt threw off the yoke of Turkey and became the ally or quasi-ally of Great Britain. That is the effect of the Décision of H.E. the Khedive of August 5, 1914 (Journal Officiel, August 6): see in particular art. 13, which authorizes the British naval and military forces to exercise all rights of war in Egyptian ports and territory, and declares that all ships captured in Egyptian territory may be brought before a British Prize Court. Although the Prize Court in Egypt sat under a British commission and was for many purposes a British Prize Court, the Hague Conventions, to which Great Britain is a party, have no application to Egypt, which was not, at the period relevant to the present case, a protectorate of Great Britain in the proper sense of that term. The Prize Court in Egypt discharged its functions in accordance with the powers contained in the Décision. At this time Port Said was a port sui generis. It was the port of a co-belligerent; but, qua Germany,

it was not an enemy port. As a Suez Canal port it had to some extent a neutral character under the international Suez Canal Convention of 1888, and although the Décision modified, it did not absolutely destroy, that neutrality.

It is possible for a place to possess at the same moment a belligerent and a neutral character: Hall's International Law, 6th ed., p. 502. But as the *Gutenfels* was using the port, not as a port of passage through the Canal but as a port of refuge, she was wholly outside the provisions of the Suez Canal Convention.

Assuming that the Hague Conventions apply to Egypt, the Crown does not wish, at present, to raise the question whether, having regard to the Order in Council of August 4, 1914 (which amounted to an offer to observe art. 1 of the Hague Convention No. VI. if Germany would do so), art. 1—and art. 2, which is complementary to it—are binding in the absence of any evidence of reciprocity in Germany; nor, although neither Serbia nor Montenegro ratified Convention No. VI., does the Crown wish to rely on art. 6, which states that the provisions of the Convention shall only apply if all the belligerents are parties to it.

The *Gutenfels* cannot claim the protection of art. 2 of Convention VI., as she was not prevented by circumstances beyond her control from leaving Port Said within the period contemplated in art. 1. Until October she was at liberty to go, and the authorities were not bound to offer her a pass; it was her duty to ask for a pass if she desired one. Art. 1 merely indicates a course of desirable conduct, and, as there is a plain reference in art. 2 to the period dealt with in art. 1, both articles must be read together. Therefore the privilege given by art. 2 is governed by the words in art. 1 "it is desirable," and both articles are recommendatory and not obligatory.

In any event the order for restoration at the end of the war cannot stand. There has been no decision in the German Prize Court as regards British ships in German ports at the outbreak of war, which are still detained, and until it is known what course Germany will pursue, it is not desirable for this country to announce that German vessels detained under similar circumstances will be restored after the war.

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Sir Robert Finlay, K.C., and *R. A. Wright*, for the respondents. Port Said, qua Germany, was an enemy port, i.e., a port under enemy control for the purposes of the war. Unless under British control it would have been illegal to set up a British Prize Court in Egypt; Wheaton's International Law, 8th ed. by Dana, p. 486; *The Flad Oyen.* (1)

Great Britain is a party to Convention No. VI., and, being the dominant power in Egypt and in control of the Egyptian ports, that Convention applies to Egypt. The Order in Council of August 4, 1914, with regard to the offer to observe art. 1 if Germany would observe it, does not apply, inasmuch as special provision was made for Egypt by the Décision of the Egyptian Government of August 5. The Décision does not depend upon reciprocity. Although art. 1 of Convention No. VI. is optional, art. 2 is obligatory, and if no days of grace have been given, or, if given, the ship has not been able to avail herself of them owing to force majeure, the ship may not be confiscated. Art. 4, which provides that "enemy cargo on board the vessels referred to in arts. 1 and 2 is likewise liable to be detained and restored after the war without payment of compensation," is clearly obligatory, and there is no reason to treat the ship differently to the cargo.

The *Gutenfels* was not permitted to leave the port. Permission to leave, unless accompanied by the offer of a pass, is illusory. The vessel was therefore entitled to remain, subject only to the liability of detention for the period of the war. The seizure of the *Gutenfels* by the *Warrior* was part of a concerted action which began in port and constituted an act of hostility in Port Said in breach of the Suez Canal Convention. The vessel should therefore be restored to her owners after the war.

Sir George Cave, S.-G., in reply. The Order in Council of August 4, 1914, applies to vessels in the ports of "any State under His Majesty's protection," and therefore applies to Egypt: cf. *The Odessa.* (2)

[Their Lordships subsequently desired to hear arguments on the question of awarding costs. These arguments are reported in the

(1) (1799) 1 C. Rob. 135; 1 Eng. P. C. 78.

(2) (1855) Spinks, 208; 2 Eng. P. C. 462.

case of *The Zamora* (1), which was set down for argument on the question of damages and costs at the same time as *The Gutenfels*.]

April 7. The judgment of their Lordships was delivered by

LORD WRENBURY. The *Gutenfels* is a German ship. Bound from Antwerp for Bombay and Karachi, she arrived at Port Said in the afternoon of August 5, 1914, and entered the port while still ignorant (as is now admitted) that hostilities had broken out between Great Britain and Germany. From August 5 to August 14 she was not free to leave. On August 14 she was informed that she was free to proceed if she liked. Matters so remained until October 13. She never asked for a pass. She was not offered one. On October 13, 1914, the Egyptian Government put a crew on board, and on the 16th they took her to sea and conducted her to H.M.S. *Warrior*, who seized her as prize and took her to Alexandria. It is admitted that this was done by arrangement between the Egyptian Government and the British Government.

At the date of these events war had not been declared between Great Britain and Turkey, and Great Britain had not declared Egypt to be a protectorate. The date of the declaration of war with Turkey was November 5, 1914. The date of the declaration of the protectorate was December 18, 1914.

The Egyptian Prize Court has pronounced the ship to have belonged at the time of seizure to enemies of the Crown, and to have been seized under such circumstances as to be entitled to detention in lieu of confiscation, and has ordered the ship to be detained by the marshal until further order; and has further declared that, in accordance with the provisions of art. 2 of No. VI. of the Hague Conventions, the ship must be restored or her value paid to the owners at the conclusion of hostilities. From this order the Crown appeals. There is no cross-appeal. The Crown contends that the ship ought to be confiscated, or, at any rate, that the question whether she ought to be confiscated, or, on the contrary, whether she must be restored or her value paid to the owners at the conclusion of hostilities, should be left to be determined after the war, and that in default of confiscation the order should be for detention till

(1) Ante, p. 77.

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further order, with liberty to apply as in the case of *The Chile*. (1) The respondents, having no cross-appeal, cannot contest the order which imposes detention.

The points which have been argued before their Lordships are numerous. Upon some of them it is unnecessary to pronounce any opinion :

First : To the Hague Convention No. VI. (which is the relevant Hague Convention, and will hereinafter be styled simply the Hague Convention) Egypt was not a party. The question has been raised whether, having regard to the anomalous position in which Egypt stood, the Hague Convention applies to Egypt. Their Lordships find it unnecessary to determine this question. They will assume, in favour of the respondents, that the Hague Convention does apply to the case before them.

Secondly : The question has been argued whether Port Said was, within the meaning of the Hague Convention, an " enemy port," that is, a port enemy to Germany. Having regard to the relations between Great Britain and Egypt, to the anomalous position of Turkey, and to the military occupation of Egypt by Great Britain, their Lordships do not doubt that it was. In Hall's International Law, 6th ed., p. 505, the learned author writes : " When a place is militarily occupied by an enemy the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil." Their Lordships think this to be right.

Thirdly : A question has been raised whether, in the events which have happened, the Hague Convention was operative and binding at the date of the events with which the Board are concerned in this case. The respondents say that it was. The law officers of the Crown have stated in the plainest terms that the British Government abide by the Hague Convention and look to Germany to do the same. The British Government, by the Order in Council of August 4, 1914, presently mentioned, acted under the Hague Convention. It is unnecessary to determine whether the Hague Convention applies or not. Their Lordships will assume in favour of the respondents that it does.

(1) [1914] P. 212, 217.

It results that the only question for determination is the construction and meaning of the Hague Convention, and that question reduces itself to the decision of a single point, namely, whether art. 2 is, or whether any part of it is, obligatory, or whether, if the course referred to as "desirable" in art. 1 be not taken, art. 2 has or has not any application to a vessel which finds itself in an enemy port at the commencement of hostilities, or which, having left its last port of call before the commencement of hostilities, enters an enemy port without having heard of the hostilities. The respondents contend that it has, the appellants that it has not. The question is one of law arising on an international document involving a reciprocal obligation performable only at the end of the war. If this Board were now to determine this question of construction, Germany might hereafter take a different view, and the performance of the obligation, as a reciprocal obligation, might become impossible.

The order made by the Egyptian Court determines that the ship must be restored or her value paid at the conclusion of hostilities. If this order were to stand, and at the conclusion of hostilities Germany maintained that the construction upon which that order is based was wrong and refused to restore or pay the value of British ships seized and detained by Germany in like circumstances, the performance of the obligation as a reciprocal obligation would be impossible unless achieved by diplomatic action. Under these circumstances the construction for which the respondents contend, involving as it does a reciprocal obligation performable only at the end of the war, cannot at present be fully determined by their Lordships in the absence of knowledge of the future attitude of the respective belligerents in that regard. Accordingly they think it incompetent to dispose of this question of construction at present.

It remains to apply the above considerations—subject to the above reservations—to the case before the Board.

On August 4, 1914, an Order in Council was issued recognizing and acting upon art. 1 of the Hague Convention, conditionally upon Germany within a limited time doing the same. Germany did not do so, and the Order in Council did not come into operation. If this Order in Council included Egypt, the result of Germany's

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refusal to concur was that neither art. 1 nor art. 2, so far as it is complementary to art. 1, took effect as regards Port Said. If, as their Lordships incline to think, it did not extend to Egypt, it may, of course, be set out of consideration. In either case nothing turns upon this Order in Council, except that it evidences the desire of Great Britain to take that which the Hague Convention indicated as the reasonable course. Their Lordships do not forget that the respondents placed some reliance upon this Order in Council as assisting in the construction which they place upon the Hague Convention, but their Lordships are unable to accept the view that it is of any service for this purpose. Even if at the date of this Order in Council Great Britain took a particular view of the construction of the Hague Convention, that fact throws no light upon the question as to what is, in fact, the true construction.

On August 5, 1914, the Egyptian Government issued a "Décision" or decree, similar in some respects to the Order in Council of August 4. This granted days of grace to sunset on August 14 to ships of not more than 5000 tons gross. But as the *Gutenfels* was of more than 5000 tons it did not apply to her.

The facts then are (assuming, as for the purposes of this judgment their Lordships do assume, that the Hague Convention applies) that art. 2, so far as it was complementary to art. 1, never came into operation by reason of the fact that as between Great Britain and Germany the recommendation agreed by art. 1 failed, by reason of the action, or, rather, the inaction, of Germany, to be carried into effect by the contracting parties. Under these circumstances, there being nothing which entitled the *Gutenfels* to remain in the port (for she had long exceeded any such limited right as might arise from a right of passage through the Canal, assuming that she had such a right), there was nothing to prevent the Egyptian Government and British Government acting as they did, and at the least seizing and detaining her during the war, to await at the conclusion of the war the determination of the questions above reserved. The order which, in their Lordships' judgment, will be right will be an order allowing the appeal, and substituting an order in the terms of that in the case of *The Chile* (1), leaving the

(1) [1914] P. 212, 217.

ultimate rights between the parties to be determined after the war. J. C. 1916 THE GUTENFELS.

Their Lordships will humbly advise His Majesty accordingly.

They think that each party should bear his own costs of this appeal.

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondents: *Botterell & Roche.*

E. C. T.

[PRIVY COUNCIL.]

WARD AND OTHERS . . . . . APPELLANTS; J. C.* 1915 *July* 8.

AND

BROWN AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Will—Construction—Executory Gift—Vesting—Period of Distribution—Defeasance.

A testator by clause 7 of his will directed that the trustees therein named should stand possessed of his residuary estate in trust to pay out of the income certain annuities to his wife and children, and that immediately after the decease of his wife they should stand possessed thereof in trust for all his said children in certain proportions. Clause 8 provided as follows: " if any child shall die in my lifetime or after my decease leaving a child or children who shall survive me then and in every such case such last mentioned child or children shall take and if more than one equally between them, the share which his or her or their parent would have taken of and in the residuary trust funds if such parent had survived me " :—

Held, that the provided shares of the residuary estate vested in the children of the testator from his death, but that in the event of the death of any child before the death of the testator's widow, which was the contemplated period of distribution, the vesting of that child's share was subject to defeasance in favour of his or her child or children.

APPEAL from an order of the Supreme Court of Jamaica (July 14, 1914) affirming an order of the Chief Justice (April 28, 1914).

The appeal related to the construction and effect of the will of Charles James Ward, deceased, dated September 24, 1913. The

* *Present:* LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and SIR EDMUND BARTON.

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material clauses of the will are fully set out in the judgment of their Lordships.

The testator died on December 7, 1913, leaving him surviving his widow, who was living at the date of the appeal, and his seven children referred to in clause 7 of the will, who had all attained the age of twenty-one years.

On April 8, 1914, an originating summons was issued in the Supreme Court, the testator's widow and children being plaintiffs and the executors and trustees under the will being defendants. At the date of the summons the testator's children C. H. Ward, F. R. Ward, and S. L. Ward had no children; all the other children of the testator had children who were living and under the age of twenty-one years. The summons asked for directions on the following questions: "(1.) whether each of the plaintiffs take a vested interest in his proportion and share in the residuary trust funds bequeathed to him or her; (2.) if the plaintiffs do not take a vested interest in his or her proportion and share in the residuary trust funds, whether upon the death of the plaintiffs C. H. Ward, F. R. Ward, and S. L. Ward, or any of them, before the period of distribution (the death of the testator's widow) without having any child, the proportion and share of such plaintiff in the said residuary trust funds passes to the testator's next of kin as in the case of an intestacy."

The Chief Justice made an order declaring that the plaintiffs did not acquire an immediate vested and indefeasible interest. With respect to the second question the Court expressed no opinion and left the matter for future decision should necessity arise. The order was affirmed on appeal by the Chief Justice with Cargill and Beard JJ.

Subsequent to the order on appeal the testator's son Arthur Claud Ward died, leaving him surviving a widow, whom he appointed as his sole executrix, and two infant children born during the life of the testator, Charles James Ward. The said widow was substituted for her deceased husband as an appellant in the present appeal, and his said infant children were added as respondents thereto by their guardian ad litem.

1915. June 21. *Sir R. Finlay, K.C., H. Terrell, K.C.*, and *Beaumont*, for the appellants. If clause 7 of the will stood alone

the testator's children would clearly take a vested interest upon the death of the testator. The rule laid down by Kindersley V.-C. in *Clavering* v. *Ellison* (1) establishes that where a vested interest is given very clear words are required to render it defeasible. The words " or after my decease " in clause 8 can have no effect without doing violence to the later part of that clause. They are inconsistent with the words " if such parent had survived me." [*In re Bragger* (2) and *In re Clark's Estate* (3) were referred to.]

A. Grant, K.C., and *Lavington*, for the infant respondents. Upon the true construction of the will the testator's children take a vested interest on the death of the testator, but the interest of any child dying before the testator's widow is divested in favour of that child's child or children. After a life interest a reference to the event of the death of a beneficiary means his or her death before the period of distribution : *Edwards* v. *Edwards* (4) ; *O'Mahoney* v. *Burdett* (5) ; *Penny* v. *Commissioner for Railways* (6) ; Theobald on Wills, 7th ed., pp. 652 et seq. The whole scheme of the will shows that the testator was providing for a distribution of the residuary trust funds at the death of his widow although there were no words directing payment.

Cave, K.C., and *Israel Davis*, for the respondent trustees.

Sir R. Finlay, K.C., in reply, referred to *O'Mahoney* v. *Burdett* (5) ; *Clavering* v. *Ellison*, in the House of Lords (7) and in the Court of Appeal (8) ; and to Jarman on Wills, 6th ed., vol. 2, pp. 2167 et seq.

July 8. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from an order of the Supreme Court of Jamaica dated July 14, 1914, which affirmed a decision of the Chief Justice of Jamaica dated April 28, 1914.

The question raised is as to the construction of certain portions of the will of Lieutenant-Colonel the Hon. Charles James Ward. The will is dated September 24, 1913. The testator died on December 7, 1913.

The clauses raising the point of construction are these : " 7. I

(1) (1856) 3 Drew. 451, 470.
(2) (1887) 56 L. J. (Ch.) 490.
(3) (1864) 3 D. J. & S. 111.
(4) (1852) 15 Beav. 357.
(5) (1874) L. R. 7 H. L. 388.
(6) [1900] A. C. 628.
(7) (1859) 7 H. L. C. 707.
(8) (1857) 8 D. M. & G. 662.

J. C. 1915 WARD v. BROWN.

devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees upon trust that my trustees shall sell call in and convert into money the same or such part thereof as shall not consist of money and shall with and out of the moneys produced by such sale calling in and conversion and with and out of any ready money pay my funeral and testamentary expenses and the legacies and bequests bequeathed by this my will or any codicil hereto and shall invest the residue of the said moneys by placing same on deposit in the Colonial Bank and the Bank of Nova Scotia or either of the said banks at their discretion and shall stand possessed of the said residuary trust moneys and investments for the time being representing the same and the income arising therefrom (hereinafter called the residuary trust funds) in trust to pay out of the said income thereof during the life of my said wife the following annual payments (payable in equal monthly instalments):—to my said wife, six hundred pounds; to my son Charles Ward, four hundred pounds; to my son Arthur Claud Ward, six hundred pounds; to my son Harry Ward, five hundred pounds; to my son Frank Ward, five hundred pounds; to my daughter Mrs. McGrath, four hundred pounds; to my daughter Mrs. Haggart, four hundred pounds; and to my daughter Sybil Ward, three hundred pounds. And from and immediately after the decease of my said wife my trustees shall stand possessed of the residuary trust funds in trust for all my said children in the following proportions and shares:—to each of my said sons a sum equivalent to four twenty-fifths of the said residuary trust funds and to each of my said daughters a sum equivalent to three twenty-fifths of my said residuary trust funds. 8. If any child shall die in my lifetime or after my decease leaving a child or children who shall survive me then and in every such case such last-mentioned child or children shall take and if more than one equally between them the share which his or her or their parent would have taken of and in the residuary trust funds if such parent had survived me."

On December 22, 1913, the will was duly proved by the executors named therein.

The testator was survived by his widow and by all of the seven children above named. They are all still alive with the exception of Captain Arthur Claud Ward, who died in action in France since the

suit was instituted, namely, on August 26, 1914. His widow and two infant children have been made parties to this appeal. Some of the other six children of the testator have children; some have not. The details are unnecessary. The true contest in the case has reference to the vesting of the shares of estate dealt with in the clauses above quoted.

By the originating summons, a question, the only one brought before the Board, was put to the Court as follows: "Whether each of the plaintiffs (the testator's children) take a vested interest in respect of his or her proportion and share in the residuary trust funds bequeathed to him or her under the will of the said testator." It is somewhat unfortunate, in the opinion of their Lordships, that the answer, as worded by the Courts below, is indirect and negative in form. But the Board does not differ in substance and result from the judgment as that is explained by the learned judges of the Supreme Court.

Both parties admitted in argument that under the clauses quoted there was vesting a morte testatoris in the testator's children, they having survived him. The appellants maintained that this vesting was absolute; the infant respondents, on the other hand, maintained that in the case of the death of any child before the period of distribution, namely, the death of the testator's widow, and of such child leaving children, the vesting of the particular share was subject to defeasance in favour of such grandchildren.

Clause 8 of the will does undoubtedly raise difficulty. The appellants' contention was that grandchildren could not take unless their parent had died in the testator's lifetime. The will says, however, "if any child shall die in my lifetime *or after my decease*"; and so the appellants boldly contend that the words "or after my decease" should be struck out. The respondents, on the other hand, are met by the fact that vesting a morte, and no later, is indicated by two expressions in the same clause referring both to children and grandchildren as surviving "me"; and they boldly contend that the word "me" should be struck out.

Fortunately clause 7 does not a little to help towards a solution. That clause makes clear what was the mind of the testator on the important subject of the realization and distribution of his estate. These were to take place at the death of his widow. She and each of

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his seven children were provided with fixed annuities to be paid during the period of his widow's survivance. All were provided with a minimum income until the widow's death, and thereupon and once for all the estate was to be divided.

Their Lordships think this consideration is paramount, and that language used by the testator bearing on the death of any of his children leaving children is prima facie referable to a child's death occurring prior to the distribution of the estate. To select for preference grandchildren born of a child who had predeceased himself, and to exclude from the succession grandchildren born of a child who had survived him but predeceased his wife—this preference and exclusion to take place in regard to grandchildren all of whom had been born and all of whose parents had died prior to the appointed distribution of the estate—this does not appear to accord with the intention of the testator.

While it would not be sound to hold that any defeasance could take place subsequent to the prescribed period of distribution, their Lordships are of opinion that at and up to that period defeasance in favour of grandchildren can and was intended to occur. The language of Lord Hatherley in *O'Mahoney* v. *Burdett* (1) shows the importance of the consideration as to the date of division and its bearing on the question of defeasance: "In those cases where the Court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the Courts have laid hold of that circumstance to say, 'We hold this defeasance to be before that period of distribution arrives,' holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed, and put into the hands of those who, having it in their hands, will of course spend it without any farther trust, and on the other hand that a subsequent event, namely a certain person's dying childless after that distribution has taken place, should divest the property, that is to say, make it necessary for the executor to take steps to get back

(1) L. R. 7 H. L. 388, 403.

again, and recall that money which he has paid in order to hand it over to those who would take under the executory devise."

The assistance derived from clause 7 thus enables the ambiguity caused by clause 8 to be cleared up. The whole will must of course be read together, according to the ordinary principle set forth in many authorities and recently by this Board in *Chunilal Parvatishankar* v. *Bai Samrath.* (1)

Their Lordships will humbly advise His Majesty that the appeal be dismissed, but that the judgment of the Supreme Court be varied in its declaration, and that it be declared that the plaintiffs under the provisions of the will acquired on the death of the testator a vested interest liable to defeasance in the event of any of them dying in the lifetime of the testator's widow leaving a child or children.

The costs of all the parties, taxed as between solicitor and client, will come out of the estate.

Solicitors for appellants and for infant respondents : *Tippetts.*
Solicitor for trustee respondents : *F. W. Atkinson.*

(1) (1914) I. L. R. 38 Bomb. 399.

[HOUSE OF LORDS.]

H. L. (E.)* ATTORNEY-GENERAL . . . . . APPELLANT;

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AND

March 27. FORAN AND ANOTHER . . . . . RESPONDENTS.

Revenue—Duties on Land Values—Valuation—Increment Value Duty—Unworked Minerals—Land in Occupation of Tenant—Minerals reserved to Owner—Notice—Form 4—Irregularity—Return made by Owner—Omission in Return to specify Nature of Minerals and Estimate of their Capital Value—Right of Owner to make Separate Return of Minerals—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 23, *sub-ss.* 1, 2, 4; *s.* 26, *sub-ss.* 1 *and* 2.

By s. 23, sub-s. 2, of the Finance (1909-10) Act, 1910, "For the purposes of valuation under this Part of this Act, all minerals shall be treated as a separate parcel of land; but, where the minerals are not comprised in a mining lease or being worked, they shall be treated as having no value as minerals, unless the proprietor of the minerals, in his return furnished to the Commissioners, specifies the nature of the minerals and his estimate of their capital value . . . ." By s. 26, sub-s. 2, the owner of land, on being required by notice from the Commissioners, must furnish to the Commissioners, within the time specified in the notice not being less than thirty days, a return containing such particulars as the Commissioners may require for the purpose of the valuation of the land, and on failure to do so is liable to a penalty not exceeding 50*l.*

The owners of a farm which was let to a tenant, the minerals being reserved to the owners and not comprised in any lease or being worked, received a notice to make a return on Form 4 which accompanied the notice. Form 4 required the owners to furnish particulars of the house and land in the occupation of the tenant, but referred incidentally to the minerals, and under the head of particulars which might be given if desired an inquiry was included as to the nature and estimate of the capital value of any minerals not comprised in a mining lease and not being worked. The notice was invalid inasmuch as it did not give the owners the thirty days allowed by the Act within which to make the return. The owners, however, filled up the form, but did not specify the nature of the minerals or the estimate of their capital value:—

Held, that the copy Form 4 served on the owners was not a proper notice requiring a return of particulars respecting the minerals and did not treat them as a separate parcel of land; that "his return"

* *Present:* LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD WRENBURY.

in s. 23, sub-s. 2, meant a return in response to a notice under s. 26, sub-s. 2, and that there had been no return with respect to minerals within s. 23, sub-s. 2; and that the owners were entitled to make a return upon a proper form in pursuance of a proper notice and to have a separate provisional valuation of the minerals treated as a separate parcel of land.

Semble: The Commissioners under the Finance (1909-10) Act, 1910, have no power to treat, for the purposes of their inquiries, an unworked and unleased minefield as divided into separate portions corresponding to the sub-divisions of the surface and to deal with each of these portions as a separate parcel of land.

Decision of the Court of Appeal [1915] 1 Ch. 703 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Warrington J.

The substantial question raised by the appeal was whether, having regard to s. 23, sub-s. 2, of the Finance (1909-10) Act, 1910 (2), the respondents were bound by a return made on Form 4 dated October 14, 1910, in which the nature of the minerals under the respondents' land was not specified and no estimate was made of their capital value, with the result that the minerals were to be treated as having no value on April 30, 1909, or whether such return was to be treated as inoperative with regard to the minerals so as to entitle the respondents to have a separate provisional valuation in respect thereof.

On April 30, 1909, and thenceforward until March 25, 1911, the respondent Canon Foran and one Charles Archer Cook were, as trustees of a settlement dated June 3, 1863, owners of the land and hereditaments comprised in the settlement, including a farm known as Appleton Farm, situate near Dover and containing about 223 acres. On March 25, 1911, the respondent Hubert Scott Cartwright was appointed a trustee of the settlement in the place of Charles Archer Cook, who retired from the trust, and thereupon the said land and hereditaments were vested in the respondents in fee simple. By a lease dated October 6, 1906, the then trustees of the settlement leased Appleton Farm to William Prebble for a term of fourteen years from October 11, 1906, at a yearly rent of 150*l.*, subject to an express reservation of the minerals thereunder.

(1) [1915] 1 Ch. 703.

(2) The material provisions of the Act are set out in a note at the end of this report.

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On September 13, 1910, Messrs. Roy & Cartwright, the solicitors to the trustees, received through the post a notice designated as "Form 1—Land," signed by F. Atterbury, Secretary to the Inland Revenue, and addressed to the owner of Appleton Farm, Waldershare, per Messrs. Roy & Cartwright. With this notice were enclosed "Form 4—Land," on which the return required by the notice to be made was to be made, and "Form 2—Land," containing instructions for making the return. This notice was dated September 10, 1910, and purported to be given under the provisions of the Finance (1909-10) Act, 1910, and the owner was thereby required to make a return in the form provided in respect of so much of the land as was situated within the parish of Sibertswold and to deliver such return "within thirty days from this date" (i.e., September 10, 1910) "to the appointed officer, J. Jacob, Shepherdswell, Dover." The notice pointed out that the expression "land" included all buildings and other structures thereon, and all minerals on, in, or under the surface of the land, and stated that minerals were to be treated as a separate parcel of land. It also drew particular attention to the accompanying instructions, and it concluded by stating that any owner required to make a return and failing to do so within the time specified was liable to a penalty not exceeding 50*l*.

At this time certain proceedings were pending in the Courts with regard to the validity of Forms 1 and 4, and on September 28, 1910, Messrs. Roy & Cartwright on behalf of their clients wrote to the Secretary of Inland Revenue requesting that the rendering of the return might be delayed until the questions in dispute should have been decided. On October 5 the Commissioners refused this request, and on October 14, 1910, Form 4 was returned filled in and signed by the trustees.

Form 4 was headed "Return to be made by an Owner of Land or by any Person receiving Rent in respect of Land." Then followed the particulars of the property extracted from the rate-books. In these particulars William Prebble was described as the occupier. The form then contained a list of inquiries classified under two heads: "I. Particulars required by the Commissioners which must be furnished so far as it is in the power of the person making the return to give them." "II. Additional particulars which may

be given if desired." Among the inquiries included under head I. were clause (*i*): "If the person making the return is also the occupier, state the annual value; i.e., the sum for which the property is worth to be let to a yearly tenant, the owner keeping it in repair," and a series of inquiries comprised in clause (*t*) relating to minerals. These inquiries and the answers thereto were as follows :—

* (*t*) (i.) Does the person making the return own the minerals comprised in the land ?	(i.) It is believed so.
(ii.) If so, state :—	(ii.) (*a*) } No. (*b*) }
(*a*) Whether the minerals were on 30 April, 1909, comprised in a mining lease or being worked by the proprietor.	
(*b*) Whether the minerals are now comprised in a mining lease or being worked by the proprietor.	
(iii.) If not, state the name and address of the proprietor of the minerals.	(iii.) The persons making the return.
* (Minerals not comprised in a mining lease or being worked are to be treated as having no value as minerals, unless the proprietor of the minerals fills up space (*w*) below.)	

In the marginal note to clause (*t*) there was a reference to clause 6 of the instructions.

Clause (*w*) was included under head II. and was as follows :—

"(*w*) Nature and estimate of the capital value of any minerals not comprised in a mining lease and not being worked, which have a value as minerals." This inquiry was left unanswered by the trustees.

In the marginal note to clause (*w*) there was a reference to clauses 6 and 10 of the instructions.

Clause 2 of the instructions provided as follows: "The

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expression 'land' includes all buildings and other structures thereon, and all minerals on, in, or under the surface of the land."

Clause 6, which followed the language of s. 23, sub-s. 2, of the Act, was as follows: "For the purposes of valuation, minerals are to be treated as a separate parcel of land; but where the minerals are not comprised in a mining lease, or being worked, they are to be treated as having no value as minerals, unless the proprietor of the minerals, in his return, specifies the nature of the minerals and his estimate of their capital value."

Clause 10 defined the total value and capital value of minerals in the terms of s. 23, sub-s. 1, of the Act.

On December 30, 1910, the then trustees of the settlement entered into a contract for sale to the Deal and Walmer Coalfield, Limited, of Appleton Farm (with a detached cottage in the occupation of one Finnis), together with all mines and minerals under the same, for 5500*l.*, subject to the lease to Prebble, and the contract was completed by a conveyance dated March 29, 1911, by the respondents, the present trustees, to the coal company. Immediately on completion Messrs. Roy & Cartwright forwarded particulars of the conveyance to the land valuation officer in order that the increment duty (if any) payable thereon might be assessed. On August 22, 1911, the Inland Revenue Commissioners served on the respondents a provisional valuation of the surface of the farm in which the original gross value was put at 3400*l.* and the original total value at 3150*l.*, and the value of the land for agricultural purposes at the same figure, 3150*l.* At the same time the Commissioners served on the respondents a provisional valuation in respect of the cottage in which the original total value was put at 120*l.*

On September 19, 1911, Messrs. Roy & Cartwright wrote to the district valuer with regard to the provisional valuation of Appleton Farm, asking for leave to amend Form 4 by claiming the value of the minerals underlying the property, and the letter continued: "If any special form is required for making this claim, will you kindly send us one that we may submit it." On April 4, 1912, the district valuer replied stating that the Commissioners saw no sufficient ground for allowing amendment. On March 13, 1913, Messrs. Roy & Cartwright wrote to the Commissioners asking for

a form upon which a return might be made of the minerals underlying Appleton Farm. On April 5, 1913, the Commissioners replied that in view of the position taken up by them—that a return had been made which did not give the nature of the minerals and the proprietor's estimate of their capital value, and that as a consequence the value of the minerals under the land in question was nil pursuant to s. 23, sub-s. 2—they could not, until this position had been shown to be unwarranted in law, recognize the right to make a further return.

The respondents, after objecting to the provisional valuation of Appleton Farm on the ground that it did not include minerals, appealed against it, and the appeal was referred to a referee appointed under the Act. On August 8, 1913, the referee gave his decision, whereby the values in the provisional valuation were slightly increased, but he gave no decision upon the question whether the respondents were entitled to have a value put on the minerals.

In the meantime—namely, on June 11, 1913—the respondents issued the writ in this action asking in substance for a declaration that they were not bound by their return on Form 4 so far as it related to minerals, and that they were entitled to have a separate valuation as to such minerals.

Warrington J. dismissed the action, but the Court of Appeal (Lord Cozens-Hardy M.R., Phillimore L.J., and Joyce J.) reversed his decision and held that the present respondents were entitled to the declarations claimed.

1916. Feb. 8, 10. *Sir Robert Finlay, K.C.*, and *Sheldon* (*Sir Frederick Smith, A.-G.*, with them), for the appellant. The notice to the respondents was invalid, as has since been decided in *Dyson* v. *Attorney-General* (1), because the time allowed for making the return was insufficient, but it does not follow that the return made thereon is not a valid return. Although the respondents were under no obligation to make a return, having made a return in fact they are bound by it. It is no objection to Form 4 that clause (*w*) is in the optional part of the form. The respondents have exercised their option under s. 23, sub-s. 2, of the Finance (1909-10) Act, 1910, by making no answer as to the value of the

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minerals, and thereupon the statutory consequence follows that the minerals are to be treated as having no value on April 30, 1909. Warrington J. correctly answers the respondents' argument on this point.

E. P. Hewitt, K.C., and *W. Allen*, for the respondents. The practical question in this case, apart from technicalities, as is admitted by the Commissioners in the correspondence, is whether the minerals for the purposes of the original valuation are to be valued at their fair value or whether they are to be treated, contrary to the fact, as of no value. The notice is bad on the following grounds :—(1.) Less than thirty days was allowed for the making of the return : *Dyson* v. *Attorney-General* (1) ; (2.) inquiry (i.) on Form 4 was unauthorized : *Dyson* v. *Attorney-General* (1) ; (3.) the return was directed to be sent to the local agent instead of to the Commissioners themselves ; (4.) there should have been a separate notice served as to minerals ; (5.) Form 4 is calculated to mislead. The whole scheme of the Act shows that a return must be in response to a valid notice : see s. 26, sub-s. 2. Here there was no such notice. A separate notice is required for minerals, minerals being a separate parcel of land, and it is the practice of the Commissioners to serve separate notices for separate parcels. Moreover, in this case the minerals were in a different occupation from the surface. This form did not relate to minerals, but to surface. No return was in fact made as to minerals, for (1.) a separate return was necessary and should have been made on Form 6 ; (2.) this form was filled up as a return of surface ; (3.) it was not furnished to the Commissioners. *Dyson* v. *Attorney-General* (1) and *Burghes* v. *Attorney-General* (2) are wrongly decided upon this point. Form 4 is in its nature misleading, for requisition (*w*) was not part of the form which the trustees were required to fill, but was one of the particulars which might be given "if desired." The note in small print at the foot of requisition (*t*) gave no sufficient indication to the trustees of the consequences which would result from not answering requisition (*w*), and the trustees were in fact misled. The fact of the trustees answering the requisitions under the threat of a penalty does not deprive them of the right to object thereto or imply

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any waiver. The respondents are therefore entitled to have a provisional valuation of the unworked minerals served upon them.

Sir Robert Finlay, K.C., replied.

The House took time for consideration.

March 27. LORD ATKINSON. My Lords, this is an appeal from an order dated March 5, 1915, of the Court of Appeal, reversing a judgment dated July 30, 1914, of Warrington J., whereby he dismissed the action of the respondents.

The principal question raised in the appeal is whether the Commissioners of Inland Revenue are entitled, in the circumstances of this case, to insist that by virtue of sub-s. 2 of s. 23 of the Finance Act of 1910 (10 Edw. 7, c. 8) the minerals within or under certain lands belonging to the respondents are to be treated as having had no value on April 30, 1909. The respondent William Francis Foran and one Charles Archer Cook were, as trustees under a certain settlement, owners of a farm known as Appleton Farm, situate near Dover, containing 223 acres or thereabouts. Charles Archer Cook retired from the trust and Herbert Scott Cartwright was appointed in his stead. This farm was held and occupied by one William Prebble, under a lease dated October 6, 1906, for a term still unexpired, at a rent of 150*l.*, all minerals being excepted. The minerals were neither leased nor worked. On September 13, 1910, the solicitors for the then owners received through the post from the Commissioners a notice described as Form 1, dated September 10, 1910, addressed to the owner of Appleton Farm, headed "'Form 1—Land' (Notice to make Returns)," and requiring them to make returns in the form prescribed in respect of so much of this farm as was situate within the parish of Sibertswold, and to deliver such return within thirty days of the date of the notice to the appointed officer, J. Jacob, Shepherdswell, Dover. At the foot of the first page of this notice attention is called to the fact that the expression "land" includes all "buildings and other structures thereon, and all minerals on, in, or under the surface of the land." The notice proceeds to state that the necessary particulars are to be furnished separately for each piece of land under separate occupation, and for the

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purposes of valuation minerals are to be treated as separate parcels of land. Attention is then invited to the instructions sent with the notice, in which (paragraph 6) sub-s. 2 of s. 23 of the statute is set out. With this form several copies of Form 4 were enclosed. It is admitted that the notice is bad under the decision in *Dyson's Case* (1), inasmuch as it required the return to be made within thirty days from a date three days anterior to the day the notice was received. Owing to the fact that proceedings were at this time pending in the Courts questioning the validity of the forms issued by the Commissioners, the solicitors of the respondents wrote to their secretary a letter dated September 28, 1910, informing them that the writers had derived information from the public Press that litigation was pending touching the validity of the forms used by the Commissioners and the mode of their service, and requesting that, if this were so, their clients might be spared the trouble and expense of filling up the forms until the points in controversy had been decided. That request was not complied with. Some time afterwards the *Dyson Case* (1) was decided, but up to that event notices such as those served had not been held to be invalid, as they afterwards were. The Commissioners thus insisted that a return should be made as required under a penalty of 50*l.*, and now have the coolness to contend that the respondents acting thus under compulsion had, by sending in a return, waived all objection to the notice by reason of defects in it of which they had then no positive knowledge, or even authentic notice. A more unsound contention could not well be urged, and, having regard to the refusal of the request for further time, a more unmeritorious one. Fortunately, it is not often that one finds public departments adopting such a course.

The Form 4 sent relates to Appleton Farm, described as situate in the parish of Waldershare. It is entitled "Return to be made by an Owner of Land or by any Person receiving Rent in respect of Land." It contains one question (*i*) which it has been decided in the *Dyson Case* (1) the Commissioners had no right whatever to ask, namely, what was the respondents' estimate of the yearly rent of the land if not occupied by the person making the return,

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Every other question to which they required an answer, with the exception of those under head (*t*), must, I think, be reasonably taken to apply to the surface of the land comprised in Appleton Farm, and nothing else. The Commissioners then apparently discovered that a small part of this Appleton Farm, two acres in extent, was situate in the parish of Sutton. And a second Form 4 was accordingly served in which precisely the same questions are asked as in the form first sent, requiring, under another penalty of 50*l*., a similar return to be made in respect of this plot of ground. By question (*t*) in both forms it was asked if the person making the return was the owner of the minerals, and, if so, (1.) were the minerals on April 9, 1909, comprised in a mining lease or were they being worked by the proprietor; and (2.) whether at the date of the return they were so leased or worked, and if the person making the return was not the proprietor, asking that the name and address of the proprietor should be stated. No question whatever was asked as to the value of the minerals. Now either these forms required information to be given touching the minerals or they did not. If they did not, cadit quaestio; if they did, then it is ridiculous, as well as, in my opinion, illegal, to require the owner of unworked and unleased minerals under a tract of land to furnish a separate return in reference to the portion of those minerals underlying each portion of the surface which may happen to be separately occupied. A minefield of 100 acres in extent might underlie a village where thirty or forty tenants occupied separate tenements on the surface above it. The portion of the minerals underlying each tenement would be quite valueless if taken by itself, because it could not be worked by itself, and independently of the neighbouring parts of the minefield. Sect. 23, sub-s. 1, provides that, for the purposes of the Act, the total value of minerals means the amount which the fee simple of the minerals, if sold in the open market by a willing seller, might in their then condition realize. And the capital value means this total value less certain deductions named. Sub-s. 2 provides that for the purpose of valuation under that part of the Act minerals shall be treated as a separate parcel of land, but where the minerals are not comprised in a mining lease, nor are being worked, they are to be treated as of no value unless the

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proprietor of them, in his return furnished to the Commissioners, specifies the nature of the minerals and his estimate of their capital value. And then in a separate paragraph it provides that minerals comprised in a mining lease, or being worked, shall be treated as a separate parcel of land not only for the purposes of valuation but also for the purpose of the assessment of duty under this part of the Act. In this latter provision the extent of the parcel of the minerals which is to be treated as a separate parcel of land is identified; but where, as here, the minerals are unworked and unleased, the question is what are the minerals which are to be treated as a separate parcel of land. Surely it cannot be merely that portion of the mineral field underlying the particular piece of surface land inquired about, namely, in this case that portion of Appleton Farm situate in the parish of Waldershare. It must mean the unworked and unleased mineral field, of which the portion underlying that farm in April, 1909, constituted a part. The first lines of s. 23, sub-s. 2, when compared with the last clause of the sub-section, clearly show this. This goes to a matter of substance.

In my view the Commissioners have no power whatever to treat, for the purpose of their inquiries, an unworked and unleased minefield as divided into separate portions corresponding to the sub-divisions of the surface and to deal with each of these portions as a separate parcel of land. They may require an owner of land to state in his return facts such as are mentioned in s. 26, sub-s. 2, for the purpose of helping them to put a value on that land, or require the proprietor of the mines to do so touching his minerals, but they have no right whatever, in my view, to ask, as they do in this form, the person making the return in respect of the surface land, if not the owner of the minerals, to investigate, it may be, the title to them, find out who is the owner of them, and give the Commissioners his name and address. That is, in my view, an illegality in this notice of which Form 4 forms part. It may be true that the Commissioners are not bound to serve any notice requiring a return to be made, but if they should omit to do so s. 23, sub-s. 2, would not work. It is based upon the assumption that a return has been required, and if the Commissioners require a return to be made touching the nature and value of unworked

and unleased minerals, it is only right and fair that they should do so in clear and unambiguous language, treating the minerals as a parcel of land of the extent and kind specified in the statute, since it is the omission on the part of the proprietor to state in his return the nature and value of his minerals that subjects him to the heavy penalty of having them treated as valueless. I use the words "heavy penalty" advisedly, because in this case it is plain, on the face of the provisional valuation taken in connection with the price for which the farm was ultimately sold, that the minerals must have been of considerable value in April, 1909, and yet, if their increment value should come to be ascertained hereafter, all value above cipher will be treated as increment value, and the proprietor taxed upon a most unjust and oppressive basis.

It is quite true that at the end of Form 4, under the head of "Additional Particulars which may be given if desired," one finds the item "The nature and estimate of the capital value of any minerals not comprised in a mining lease and not being worked which have a capital value"; but these facts are not *required* to be stated. It is left optional to state them or not. The only return contemplated by s. 26 is a return made in response to a notice requiring that it should be made; therefore the words "his return" in s. 23, sub-s. 2, must mean a return which the proprietor is by a valid notice lawfully required to make.

Form 4 treats the return as relating to Appleton Farm. With the exceptions already referred to, the information asked for relates solely to the surface of the land. The Commissioners do not in this Form 4 treat the minerals in reference to which they demand information as a separate parcel of land at all. The very fact that the item I have mentioned is found amongst the particulars which may be given if desired is, I think, calculated—I do not say designed or intended—to mislead.

Well, the respondents did not, in their return, insert any sum as the capital value of their minerals. If Warrington J. was under the impression that they did so he was mistaken.

I concur with the Court of Appeal in thinking that the copy of Form 4 supplied to the respondents did not in a proper or intelligible manner require to be stated the particulars authorized

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by the statute to be required to be stated respecting minerals. It was not framed according to the requirements of the statute, and was, by reason of its several defects, an invalid notice which the respondents might with safety have disregarded. I am clearly of opinion, therefore, that the respondents did not, by making, under compulsion, a return in response to this notice, elect to treat it as valid and waive their right to rely upon its defects when their effect upon its validity had been subsequently decided by the Courts. In my view, as in that of the Court of Appeal, the respondents are now entitled with respect to the unworked and unleased minerals which formerly belonged to them to make a return upon a proper form in compliance with a proper notice from the Commissioners, and to have a separate provisional valuation made of the minerals in question treated in the manner prescribed by the statute. I think it is in the interest of justice that this should be so, for this reason. By the provisional valuation dated August 22, 1911, it is found that the gross value of Appleton Farm as agricultural land is 3400*l.* The original total value of the land for agricultural purposes is 3150*l.* The negotiations for the sale of the farm, including the minerals, commenced in August, 1910, before any notice was served by the Commissioners. They resulted in a sale of the farm, including the minerals, on March 29, 1911, for a sum of 5500*l.* It is quite impossible that the value of the surface land should have varied much between April, 1909, and March, 1911. A considerable portion of this sum of 5500*l.* must, therefore, have been paid in respect of the minerals. On March 29, 1911, over four months prior to the date of the provisional valuation, the solicitors of the respondents duly informed the Commissioners, by letter addressed to Mr. Jacob, that the farm, including a detached cottage, had been sold for this sum of 5500*l.* It must thus have been brought home to the minds of the Commissioners that the capital value of the minerals underlying Appleton Farm was not nil, but formed a very considerable portion of this sum of 5500*l.*

A copy of their provisional valuation, in which there is not a single reference made to minerals, was sent to the respondents on August 22, 1911, and on September 19, 1911, their solicitors wrote to Mr. B. G. Turner, the district valuer, asking liberty to

amend Form 4 by introducing a claim for minerals. This was refused after many months' delay. On October 2, 1911, objections to the provisional valuation were filed and notice given that the respondents desired the provisional valuation to be amended by adding a claim for minerals. By s. 27, sub-s. 3, the Commissioners are empowered to amend any provisional valuation, whether objected to or not. They must, from the day they were informed of the sale, have been well aware that it was not the fact that minerals were of no value in April, 1909, and that the refusal to amend might, when increment value came to be ascertained, result in mulcting heavily the owners of these minerals. It has been urged that they considered that the provision of s. 23, sub-s. 3, prohibited them from amending either Form 4 or the provisional valuation and bound them to take their stand on the statutory estoppel, shutting out the truth. It may be that they are right in this, strange though it be, and that these returns, made to aid the Commissioners in fixing values, are, in reference to minerals, but not to any other matters, incapable of amendment. Upon that point, which is not before the House, I give no opinion. But to this statutory estoppel, shutting out the truth and working possible injustice, are the Commissioners so devoted that they refuse to be bound by the decision of the Court of Appeal and bring the respondents before this House in the effort to sustain a proceeding which, even if it were technically within the letter of the law, has no merits to support it.

The appeal should, in my opinion, be dismissed.

If the parties desire to raise any question as to costs I will put the question in a form that will leave that point open.

Lord Parker of Waddington. (1) My Lords, I have come to the same conclusion. Under the 26th section of the Act it is the duty of the Commissioners to cause a valuation to be made of all "land" within the United Kingdom, showing separately as to each parcel (1.) "the total value" and (2.) "the site value." Land includes both minerals and surface, but minerals and surface are to be dealt with separately, and in the case of minerals "total value" and "site value" are not quite the same things as in the

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case of surface. These values are, in the case of surface, to be ascertained under s. 25, which has no application to minerals, and in the case of minerals under s. 23, which has no application to surface. Thus in the case of surface every piece of land in separate occupation is for valuation purposes a distinct parcel. It is different in the case of minerals. These under s. 23 appear to be divided into three distinct classes—(1.) those comprised in a mining lease; (2.) those not so comprised, but being worked; and (3.) those not so comprised and not being worked. The section is somewhat obscure, but apparently minerals comprised in a single mining lease, or not so comprised but being worked as part of a single undertaking, constitute in each case a separate parcel for the purpose of valuation. In the case of minerals which are neither comprised in a mining lease nor being worked there appear, however, to be no criteria other than those of title and situation by which to determine into what separate parcels they should be divided for valuation purposes. Certainly surface occupation has nothing to do with the matter. It would be absurd, from the business point of view, if it had. The surface overlying a coalfield might be occupied in parcels by a thousand different tenants, and the coalfield as a whole might be of great value, though the coal under each parcel, taken separately, might have no value at all. In such a case the coalfield, if belonging to a single owner, would certainly have to be valued as a single parcel. The Commissioners could not insist on valuing the coal under each parcel separately.

Before valuing any parcel of land the Commissioners have power under sub-s. 2 of s. 26 to serve a notice on (1.) the owner and (2.) any person receiving rent in respect of the parcel to be valued, requesting him to make a return containing such particulars in relation to that parcel as in the sub-section mentioned. There is a penalty not exceeding 50*l.* for not making such a return within the time, not being less than thirty days, specified in the notice. It is doubtful whether the service of such a notice is not a condition precedent to the valuation, for any owner may under the 3rd sub-section furnish to the Commissioners his estimate of the total value or site value, or both, of the land, and the Commissioners are bound in making their valuation to consider any estimate

so furnished. It is apparently contemplated that the estimate (if any) will be made in the return. Further, in the case of a parcel of minerals not comprised in a mining lease or being worked, serious consequences may ensue under s. 23, sub-s. 2, if the "proprietor" does not specify "in his return" the nature and his estimate of the capital value of the minerals; capital value being, by sub-s. 4 of the same section, made equivalent to site value. The words "his return" must refer to a return under s. 26, sub-s. 2. There is no other return in the Act to which they can refer. It is evidently contemplated that the "proprietor" will be one of the persons to be served with notice under this section and sub-section. Whether this is so in every case may be doubted, having regard to different definitions of "owner" and "proprietor" respectively contained in ss. 41 and 24. Indeed in some cases there may be no proprietor. A person entitled in reversion expectant on the determination of a foreclosed mortgage term with five years still unexpired could hardly be properly described as a person entitled in possession, and the termor as a lessee for a short term is apparently excluded from the definition. But however that may be, s. 23, sub-s. 2, also points to the giving of notices under s. 26, sub-s. 2, being a condition precedent to any valuation under s. 26, sub-s. 1.

It is to be observed that any valuation under s. 26, sub-s. 1, must, under s. 27, be served on the "owner," and if the "owner" considers that either total value or site value as stated in the valuation is incorrect he may give notice of his objection, and such objection may be allowed or rejected by the Commissioners, who with or without objection have full power to amend the valuation. If the valuation be not amended to the satisfaction of the objector, he has a right to appeal. Any person interested, not being the owner, has a similar right of objection and appeal. There is nothing in s. 27 to exclude from its provisions cases in which minerals are, under s. 23, sub-s. 2, to be treated as having no value. Indeed, there is every reason why such cases should not be so excluded. Even admitting that there must always be a proprietor of minerals within s. 23, sub-s. 2, and that such proprietor must always be one of the persons to be served with a notice under s. 26, sub-s. 2, still it is quite clear that the proprietor

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may have little real interest in the matter. It would be unfair that the persons really interested should suffer because a person with little or no interest failed to specify the nature of the minerals or to estimate their value, and I cannot see why the Act should be construed as having this effect. In my opinion s. 23, sub-s. 2, ought under these circumstances to be read merely as containing directions to be followed by the Commissioners in making their valuation under s. 26, sub-s. 1. The words "for the purposes of valuation" in s. 23, sub-s. 2, naturally govern the whole clause. The provisions of the clause are fully satisfied if the Commissioners in making their valuation follow the directions it contains, and any error or mistake can be rectified, and indeed ought to be rectified, under s. 27 upon objection made by the owner or other party interested.

It appears to me that the above considerations are sufficient to dispose of the present appeal. The Commissioners have neither made under s. 26, sub-s. 1, nor served under s. 27, sub-s. 1, any valuation of the minerals in question. It is their duty to do so, and if and when they fulfil their duty the respondents can carry in objections in the usual way. If there has been any failure on the part of the proprietor, under s. 23, sub-s. 2, to specify the nature and estimate the value of the minerals, they will in their valuation treat the minerals in question as having no value; but if this failure has been due to error or inadvertence on the part of the proprietor, or if the real value of the minerals be shown, the valuation can and ought, upon objection by any person interested, to be amended so as to make it a correct valuation according to the established facts. If the Commissioners do not so amend the valuation an appeal will lie.

My Lords, where statutory consequences are to ensue upon failure to give certain information in a statutory return pursuant to a statutory notice, these consequences can only arise where a proper statutory notice has been given. For the reasons given by my noble and learned friend Lord Atkinson and about to be given by my noble and learned friend Lord Wrenbury, I am of opinion that the notice relied on in the present case was not a valid notice pursuant to the statute, and that on this ground also the appeal fails.

LORD SUMNER. (1) My Lords, the penal provision (for such it truly is) which s. 23, sub-s. 2, of the Finance (1909-10) Act, 1910, enacts in the case of a proprietor of minerals, not comprised in a mining lease or being worked, is one which, for its true construction, must be read with s. 26, sub-s. 2, following. His minerals "shall be treated as having no value as minerals," unless "in his return furnished to the Commissioners" he specifies their nature and estimates their capital value. "The Commissioners" are the Commissioners of Inland Revenue, and "his return" is the return which s. 26, sub-s. 2, binds him to furnish to them. His obligation under that sub-section only arises upon a condition, namely, "on being required by notice from the Commissioners." That notice must, by the words of the sub-section, firstly, require certain particulars as to various enumerated matters "and any other matters, which may properly be required for the purpose of the valuation of the land and which it is in his power to give," and, secondly, must specify "the time, not being less than thirty days," within which he is required to make his return. As he incurs a substantial money penalty by failing to make such return within the time specified, it is clearly implied, thirdly, that, in order to impose the obligation named in the sub-section upon the owner, who is required to furnish the return, the notice itself must also be such as complies with the sub-section. In other words, he shall, on being required by notice from the Commissioners framed and given in conformity with this sub-section, furnish to the Commissioners a return. It is this return, so furnished in compliance with such a notice by the owner of land, that is "his return" within s. 23, sub-s. 2, when he is also the proprietor of the minerals thereunder not comprised in a mining lease or being worked. In my opinion it is plain that, for the valuation of minerals not comprised in a mining lease or being worked, whether they are valued at a positive value or at no value at all, the scheme of the Act requires that the Commissioners should begin their valuation by demanding of the owner a return under s. 26, sub-s. 2, and that they cannot carry out their obligations under s. 26, sub-s. 1, independently of the procedure named in s. 26, sub-s. 2. Were it otherwise, by forbearing to give the owner an opportunity of making

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any return at all under s. 26, sub-s. 2, they could enforce upon him a disadvantageous measure of value under s. 23, sub-s. 2, which the section itself intended that he should have an opportunity of averting.

In the present case the Commissioners served the respondents with a notice, which did not comply with s. 26, sub-s. 2. Various defects in it have been pointed out, but one at least makes it admittedly bad, namely, the insufficiency of the time allowed for making the return. The decision of the Court of Appeal in *Dyson* v. *Attorney-General* (1) is not questioned.

My Lords, it might be thought that this is an end of the matter. There was no return that the respondents were bound to furnish within s. 26, sub-s. 2, and, therefore, no return within s. 23, sub-s. 2, and consequently the event, which alone could cause the minerals in question to be treated as having no value as minerals, has never arisen. In fact, however, not anticipating the decision in the case of *Dyson* (1), and bowing to constituted authority without scrutinizing its claims, the respondents made what purported to be a return to the notice known as Form 4. The Attorney-General now contends that although the Commissioners' notice might have been ignored by the respondents without prejudice to themselves, yet, by not ignoring it, by treating it as truly being what it purported to be, namely, a valid requirement, and by omitting to state, in what undoubtedly they took to be a return, the nature of the minerals, which was known to them, and their estimate of their capital value, which they could have formed but did not wish to state, the respondents have irretrievably prejudiced themselves in manner provided in s. 23, sub-s. 2.

It is a singular contention for the Crown to raise against the subject in a question upon a taxing Act, for it is only possible to raise it on the assumption that the Act is to be construed adversely to the subject and with marked favour to the Crown. The argument is that the infirmities of the notice merely prevented the Commissioners from recovering penalties in case it was treated with contempt, but did not prevent them from holding the subject bound by the penal consequences of s. 23, sub-s. 2, when the subject, not by way of waiver of rights but in compliance with a purported

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lawful demand, in fact made a response which might have been refused.

My Lords, in my opinion the argument is unsound. Volunteered information is not a " return " within the meaning of s. 23, sub-s. 2. In taxing matters a taxpayer's " return " is something consequent upon and is the complement of a notice requiring and obliging a return to be made. Information given, when there is no enforceable requirement and no obligation to comply, is not a return whatever its form. For the purposes of this Act no return was made. Again, the notice, that is to say, Form 4, cannot be bad for one purpose under the Act and good for another. Not being such a return as raised the obligation under s. 26, sub-s. 2, it would neither bring that sub-section into force so as to make the recipients liable to a penalty, nor bring s. 23, sub-s. 2, into force so as to fix the value of the minerals at nil. In my opinion under this Act an owner of land, who is required by the notice, which he receives, to furnish particulars as to the surface and its occupation, and is also questioned as to the subjacent minerals (whether rightly so or not I do not stop to inquire), is entitled to have such notice treated as a whole. If, owing to any non-compliance with s. 26, sub-s. 2, it is not such a notice as is therein mentioned, it is as against him void altogether, and, in equal measure, he is neither bound in respect of his answer nor in respect of his refusal to answer. I think the appeal fails.

Lord Wrenbury. My Lords, the question upon this appeal is whether the document of October 14, 1910, signed by the respondents was a return made by them under the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), within the words " his return " in s. 23, sub-s. 2, of the Act.

The return to which reference is made in that section is the return which under s. 26, sub-s. 2, is to be furnished " on being required by notice from the Commissioners." The first question is whether the respondents were so required by notice. To determine this I have to examine what notice they received.

The Act provides by s. 26, sub-s. 1, that each piece of land which is under separate occupation shall be separately valued, and by s. 23, sub-s. 2, that for the purposes of valuation all minerals

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shall be treated as a separate parcel of land. The respondents were owners of two properties in the occupation of two several tenants named, respectively, Prebble and Finnis. They were also the owners of the subjacent minerals. The notice upon which the present case turns is that relating to Prebble's land. He was a lessee of the surface reserving the minerals. The owners therefore had three parcels of land for valuation—Prebble's surface land, Finnis's land, and the minerals which by virtue of the Act were to be treated as a separate parcel of land. They were served with a notice as to Prebble's land, and I suppose with a notice as to Finnis's land. They were served with no notice as to the minerals as a separate parcel of land. The Commissioners on August 22, 1911, served copies of two provisional valuations—the one as to Prebble's land, the other as to Finnis's land. They neither made nor served any provisional valuation as to the minerals. My Lords, in my opinion they never served any notice which could form the basis for a valuation of the minerals, and there never was a provisional valuation of the minerals. The provisional valuations of August 22, 1911, do not include them.

Suppose there is an owner of forty acres of land containing minerals, and that the surface is in the occupation of thirty tenants reserving the minerals—some being tenants of cottages in the village, some of farms, and so on. Each piece of land which is under separate occupation is to be separately valued (s. 26, sub-s. 1). There will therefore be thirty separate valuations of the surface. But of the minerals as a separate parcel of land there can be one only. There never was a notice to lead to such a valuation. There is no statutory authority to value the subjacent minerals in portions corresponding to the occupational holdings of the surface. The Act provides exactly the contrary. Upon this first ground the appellants, in my judgment, fail without more.

But there are other and independent grounds upon which also they must fail.

I turn to the notice of September 10, 1910, and I find that it requires "returns in the form provided in respect of so much of your land as is situate" in a named parish. It states that the expression "land" includes all minerals. On turning to "the form provided" I find that it describes certain 215 acres 3 roods

in the occupation of Prebble. This was surface to the exclusion of minerals. In the margin, however, is "See Instruction No. 2." That instruction was that land includes minerals. There are two alternatives—either the notice did include the minerals or it did not. If it did not include the minerals cadit quaestio, the statutory procedure for valuing the minerals never commenced. If it did it was addressed to two separate parcels of land which are by the statute to be valued separately, and was a bad notice. This point of separate valuation is not academic, but important. The valuation must be the outcome of a notice given with respect to that subject-matter. The valuation, when made, must be served (s. 27, sub-s. 1), and the owner has a right of objection to it (s. 27, sub-s. 2); and others may give notice of objection and may appeal (s. 27, sub-s. 5), and so on. Upon this second ground again the appellants must fail.

Further, let me make the assumption that the notice of September 10 could and did extend to the minerals. Upon the decision in *Dyson* v. *Attorney-General* (1) it was a bad notice. The appellants do not question that decision. The principle applies exactly to this case. For the notice in this case required the owner under the threat of a penalty to answer questions which there was no statutory authority to ask him. First, question (*t*) (iii.) in Form 4 requires him to state the name and address of the proprietor of the minerals if he is not himself the owner. Why is he bound to know or to answer as to the title of another, and to be exposed to a penalty if he does not reply? If so, anybody may be interrogated as to any one else's title, and may be visited with a penalty if he does not answer. Secondly, question (*t*) (i.) requires him to answer whether he owns the minerals. There is no right to ask this question. He may be a squatter with a ripening title by adverse possession, and it may injure him to answer. Whether that is the case or not, he cannot be asked to make a statement or an admission as to his own title or want of title. If he is the owner the Commissioners can ask him such questions as are authorized by s. 26, sub-s. 2, and if he is the owner can ask him as to the ownership. But the question whether he is owner or not does not arise until he refuses to answer and proceedings are

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taken against him for default of a return. Upon this ground, assuming the notice to be addressed to the minerals, it was, in my judgment, an invalid notice. The questions at clause (*t*), if they can be justified at all, can be justified only as inquiries made with a view to a further notice as to minerals to be addressed to the proper person, whoever he may be. In fact, if the party interrogated answered that another named person owned the minerals, the practice, I understand, was to serve that person with Form 6, containing detailed questions addressed to minerals which are not found in Form 4. I may add that the notice includes question (*i*), which was the subject of the decision in *Dyson* v. *Attorney-General* (1), and if the appellants were right in their contention that the parcels at the head of the notice include the minerals, then the owners were asked question (*i*). For they were in the occupation of the minerals so far as there can be occupation of unworked minerals. Again, therefore, the notice would be invalid.

Lastly, the notice was bad for not giving the thirty days required by s. 26, sub-s. 2.

I need say no more upon the question that the notice was a notice not within the statute and invalid for the purposes of the statute.

The respondents, however, signed and returned the form, and the appellants argue that it is then immaterial whether the notice was valid or not. I see that Warrington J. accepted this contention. "The validity," he said, "or otherwise of the notice and of Form 4 is immaterial to the question to be decided." With all respect to the learned judge, I am wholly unable to agree. For the word "immaterial" I substitute the word "vital." An invalid statutory notice cannot be the parent of a binding statutory return, so as to expose the party making it to statutory consequences. The statutory consequences follow only upon a statutory return. A statutory return is the reply to a valid statutory question. A statement voluntarily made, say, by a letter could not lead to statutory consequences. A statement made in answer to questions which cannot be asked under the statute, and upon the footing that the statement can be enforced when it cannot, stands in no better position. There was no waiver. The fact here is that if

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the respondents had not filled up and signed the form they would have been in no default and have incurred no penalty. The notice, if it was a notice, as to both surface and minerals was invalid. The whole Form 4 was invalid. The time given to answer was insufficient. The notice, as a notice, did not comply with the Act. It was not a statutory notice. It could not lead to a statutory return. There was nothing which satisfied the words "his return" in s. 23, sub-s. 2, and the consequences of s. 23, sub-s. 2, never ensued.

My Lords, I cannot part with this case without referring to some points which have given me great concern. The Act is so framed as that as regards (1.) land and (2.) minerals there exists a difference of vital importance to the owner as to whether he does or does not furnish an estimate of value. As regards land it serves no useful purpose, so far as he is concerned, to give an estimate at all. Question (*i*), asking him annual value, was not justified. The owner would be well advised to give no estimate. As regards minerals, exactly the contrary is the case. If the notice relates to minerals and he gives no estimate of their value, then by virtue of s. 23, sub-s. 2, they are to be treated as having no value. The contention of the Commissioners is that this notice did relate to minerals. But in Form 1, the principal and introductory document which the recipient would primarily read, the contrast is not pointed out. The sentence runs: "You may, if you think fit, furnish your estimate of the total value and site value of the land." I know that clause 6 of Form 2 and the footnote to (*t*) (iii.) in Form 4 call attention to the consequences of no estimate being given. But I regret that a form issued by a Government department with a view to enforcing liability under a taxing statute should assume a shape which I should not be surprised to find in a prospectus issued by a company promoter, but which is not worthy of the source from which this document comes. The form concludes by a head of "Additional Particulars which may be given *if desired*," and amongst them is (*w*), which it was vital in the interests of the mineral owner to answer, if the notice was, as the appellants contend, a notice as regards the minerals.

My Lords, the other matter is this: On September 19, 1911, the owners having ascertained, I suppose, the importance of the

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point, wrote asking leave to amend their answer to Form 4 by claiming the value of the minerals. Receiving no reply, they wrote again on October 6 and sent formal notice of objections to the provisional valuations. On April 4, 1912, the district valuer wrote refusing amendment. This was followed by letters of July 29, 1912, and November 27, 1912, in which the appellants held the respondents bound to the consequences of s. 23, sub-s. 2. My Lords, the duty of the Inland Revenue to the public does not include a duty to enforce against a taxpayer a liability under which he would not, in fact, lie if he had not by an error, to which they have, indeed, I think conduced, failed to protect himself by an entry in his return. The point becomes in the present case immaterial. But I must express my regret that the Commissioners should take such a view of their duty. It is a wholly erroneous view.

My Lords, for the reasons which I have assigned I think this appeal entirely fails and must be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed. And the Attorney-General alleging, but not insisting, that the Crown cannot be ordered to pay costs, and not objecting, the appellant to pay the costs in the Courts below and the costs of the appeal to this House.

Lords' Journals, March 27, 1916.

Solicitor for appellant: *H. Bertram Cox, Solicitor of Inland Revenue.*

Solicitors for respondents: *Roy & Cartwright.*

NOTE.—Finance (1909-10) Act, 1910, s. 23 :—

"(1.) For the purposes of this Part of this Act, the total value of minerals means the amount which the fee simple of the minerals, if sold in the open market by a willing seller in their then condition, might be expected to realise, and the capital value of minerals means the total value, after allowing such deduction (if any) as the Commissioners may allow for any works executed or expenditure of a capital nature incurred bona fide by or on behalf of any person interested in the minerals for the purpose of bringing the minerals into working, or where the minerals

have been partly worked, such deduction as is, in the opinion of the Commissioners, proportionate to the amount of minerals which have not been worked.

"(2.) For the purposes of valuation under this Part of this Act, all minerals shall be treated as a separate parcel of land; but, where the minerals are not comprised in a mining lease or being worked, they shall be treated as having no value as minerals, unless the proprietor of the minerals, in his return furnished to the Commissioners, specifies the nature of the minerals and his estimate of their capital value.

. . . . . .

"(4.) Except where the context otherwise requires, any references in this Part of this Act to the site value of the land shall, in cases where the land consists solely of minerals, or comprises minerals, be construed, so far as respects the minerals, as a reference to the capital value of the minerals."

Sect. 26: "(1.) The Commissioners shall, as soon as may be after the passing of this Act, cause a valuation to be made of all land in the United Kingdom, showing separately the total value and the site value respectively of the land, and in the case of agricultural land the value of the land for agricultural purposes where that value is different from the site value. Each piece of land which is under separate occupation, and, if the owner so requires, any part of any land which is under separate occupation, shall be separately valued, and the value shall be estimated as on the thirtieth day of April nineteen hundred and nine.

"(2.) Any owner of land and any person receiving rent in respect of any land shall, on being required by notice from the Commissioners, furnish to the Commissioners a return containing such particulars as the Commissioners may require as to the rent received by him, and as to the ownership, tenure, area, character, and use of the land, and the consideration given on any previous sale or lease of the land, and any other matters which may properly be required for the purpose of the valuation of the land, and which it is in his power to give, and, if any owner of land or person receiving any rent in respect of the land is required by the Commissioners to make a return under this section, and fails to make such a return within the time, not being less than thirty days, specified in the notice requiring a return, he shall be liable to a penalty not exceeding fifty pounds to be recoverable in the High Court."

[HOUSE OF LORDS.]

H. L. (E.)* 1916 May 8.

FOSTER . . . . . APPELLANT;

AND

BARNARD. . . . . RESPONDENT.

Stock Exchange—Stockbroker and Client—Purchase of Shares—Resale at a Loss—Power of Unpaid Stockbroker to resell without the Leave of the Court—Courts (Emergency Powers) Act, 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1, *sub-s.* 1 (*b*).

The Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1, provides that from and after the passing of the Act no person shall—(*b*) (inter alia) take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, or "realise any security (except by way of sale by a mortgagee in possession)" for the purpose of enforcing the payment or recovery of any sum of money to which the sub-section applies, or in default of the payment or recovery of any such sum of money, except after an application to the Court.

In July, 1914, a stockbroker on the London Stock Exchange bought from a jobber certain shares on the instructions of a client. After the passing of the Courts (Emergency Powers) Act the stockbroker paid the jobber for the shares, but as his client declined to take delivery and pay for them at the settlement, he sold them at a loss and sued the client for the difference between the money paid for them and the amount which they realized at the resale :—

Held, assuming without deciding that the shares were a "security" within s. 1, sub-s. 1 (*b*), of the Act, that the broker was at the time he realized "a mortgagee in possession" and was therefore entitled to realize the security without first obtaining the leave of the Court.

Ziman v. *Komata Reefs Gold Mining Co.* [1915] 2 K. B. 163 approved.

Decision of the Court of Appeal [1916] 1 K. B. 632 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Sankey J. (2)

On July 30, 1914, the respondent, who was a stockbroker on the London Stock Exchange, bought, on the instructions of the appellant, 100 Canadian Pacific Railway shares at 165½ from a firm of jobbers named P. B. Coombe & Co. for the mid-August account, which at

* *Present :* VISCOUNT HALDANE, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

(1) [1916] 1 K. B. 632. (2) [1915] 2 K. B. 288.

that time was fixed to take place on August 13, 1914. By successive resolutions of the Committee of the Stock Exchange the account day for the mid-August account was from time to time postponed, and was finally fixed for November 18, 1914. On November 16, 1914, the respondent wrote to the appellant enclosing an account showing a balance due of 3322*l.* 13*s.* 8*d.* and requesting payment on November 18, 1914. The appellant did not make the payment asked, but on November 18, 1914, the respondent paid Messrs. P. B. Coombe & Co. for the shares and received from them the share certificates indorsed in blank. On November 19, 1914, the respondent wrote to the appellant demanding payment of the 3322*l.* 13*s.* 8*d.* and threatened to sell the shares unless he received payment on or before November 21. On November 20, 1914, the appellant wrote to the respondent disputing the respondent's right to sell under the existing abnormal conditions and calling his special attention to the provisions of the Courts (Emergency Powers) Act, 1914. On November 23, 1914, the respondent resold the shares to Messrs. P. B. Coombe & Co. at 159, and on the same date rendered an account to the appellant crediting him with the proceeds of this sale and showing a balance to his debit of 142*l.* 19*s.* 8*d.*; and on December 7, 1914, he brought an action against the appellant for this sum.

The appellant by his defence and counter-claim pleaded that by reason of s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914 (1), the respondent was not entitled to sell the shares without the leave of the Court, and claimed damages.

At the trial Sankey J. decided against the appellant on the ground

(1) Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1 :—

"From and after the passing of this Act no person shall—

. . . . .

"(*b*) levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this sub-section applies, for the purpose of enforcing the payment or recovery of any sum of money to which this sub-section applies, or, in default of the payment or recovery of any such sum of money, except after such application to such Court and such notice as may be provided for by rules or directions under this Act."

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that the shares never belonged to the appellant and were not a security within the meaning of the Act, and gave judgment for the respondent for the amount claimed. This judgment was affirmed by the Court of Appeal (Swinfen Eady, Phillimore, and Pickford L.JJ.) on the ground that, assuming the shares were a security within the meaning of the Act, the respondent was a mortgagee in possession of the shares, and, therefore, entitled to sell them without application to the Court.

The Appellant in person. This scrip is a security within the meaning of s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, and the respondent has no right to enter into possession of it or sell it without the leave of the Court. The Courts below have decided in favour of the respondent, but on different grounds. Sankey J. held that the scrip was not a security because it never belonged to me, and he based his decision on *Lacey* v. *Hill, Scrimgeour's Claim* (1); but in *Lacey* v. *Hill, Crowley's Claim* (2) Jessel M.R. in the course of the argument distinguished *Scrimgeour's Claim* (1) on the ground that there the shares belonged to the client, which is the exact contrary of Sankey J.'s view of the case. The Court of Appeal on the authority of *Ziman* v. *Komata Reefs Gold Mining Co.* (3) held that the respondent was a mortgagee in possession within the exception in sub-s. 1 (*b*). But, first, that case is distinguishable, because there possession was taken before the passing of the Act, and, secondly, it was wrongly decided. Upon the true construction of clause (*b*) the exception is limited to the case where the mortgagee is already in possession at the passing of the Act, and this may be inferred from clause (*a*), which shows that when the Legislature intended to include both periods it said so expressly. Further, the clause refers to a mortgagee in possession in the ordinary meaning of the term—i.e., to a mortgagee of real estate who has taken possession adversely to the debtor. This view is supported by the terms of the application of the Act to Scotland in s. 2, where "creditor in a heritable security" is substituted for "mortgagee." It must have been intended that the law should be

(1) (1873) L. R. 8 Ch. 921.
(2) (1874) 43 L. J. (Ch.) 551; L. R. 18 Eq. 182, where the dictum does not appear.
(3) [1915] 2 K. B. 163.

the same in both countries. It is only by the loosest use of language that this transaction can be described as a mortgage and the respondent as a mortgagee in possession. There are three distinct classes of security known to the law—mortgage, lien, and pledge—and the various definitions of mortgage given in the cases and in the textbooks recognize this distinction.

" A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt " : per Lindley M.R. in *Santley* v. *Wilde* (1), adopted by Lord Halsbury in *Noakes & Co.* v. *Rice.* (2) See also *Wilson* v. *Heather* (3) ; *Halliday* v. *Holgate* (4), per Willes J. ; *Harrold* v. *Plenty* (5), per Cozens-Hardy J. ; Fisher on Mortgages, 6th ed., p. 1 ; Coote on Mortgages, 8th ed., vol. 1, p. 6 ; Halsbury's Laws of England, vol. 21, p. 70, tit. " Mortgage." The Act intended to protect a mortgagor against an adverse sale except in the case of a mortgagee in possession in the strict sense of the term at the date of the passing of the Act.

Gore-Browne, K.C., and *Alexander Neilson*, for the respondent, were not called upon.

VISCOUNT HALDANE. My Lords, in this case the question is whether the respondent, who is a stockbroker, is entitled to recover from the appellant a sum of a little over 142*l.* on the balance of an account which, as made out, shows that the broker has sold certain Canadian Pacific Railway shares, which he had bought on behalf of the appellant, in default of payment by the appellant, to which he claimed to be entitled. The account shows the amount realized, gives credit for dividends and debits certain expenses which have been incurred, and the balance amounts to the sum I have stated. For that he brought an action against the appellant which was tried before Sankey J. in the Commercial Court, and judgment was given for the plaintiff. The Court of Appeal, for somewhat different reasons from those stated by Sankey J., have come to the same conclusion as he did, and have dismissed the appeal ; and the question is whether what has been decided in the Courts below is right.

Now the case was argued by the appellant in person, and I wish

(1) [1899] 2 Ch. 474.
(2) [1902] A. C. 24, 28.
(3) (1814) 5 Taunt. 642.
(4) (1868) L. R. 3 Ex. 299, 302.
(5) [1901] 2 Ch. 314, 316.

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to say that, having listened carefully to his argument, I think he presented his case with great judgment, abandoning all points which were obviously untenable and concentrating himself on the main points, and during his argument he brought out these main points so fully that I think he has at any rate the satisfaction of knowing that even if it had been argued by counsel he could not have brought out more on his own behalf.

My Lords, shortly stated the case is this. The shares, as I have said, were shares of the Canadian Pacific Railway, and the case is that the respondent, who was the plaintiff in the action, and who was a broker on the Stock Exchange, purchased on the instructions of the appellant 100 of these shares at the price of 165½ on July 30, 1914. These shares were resold, as will appear, at a loss. July 29, 1914, was the last pay-day on the Stock Exchange before the purchase and the commencement of the war, and when the war broke out an Act was passed on the terms of which the controversy turns—the Courts (Emergency Powers) Act, 1914. The purpose of that Act was to relieve people from obligations which the outbreak of war prevented them from discharging, at any rate for a period which might or might not be prolonged. The day after the pay-day I have mentioned, and for a new account, the plaintiff, acting on the instructions of the appellant, made the purchase to which I have referred, and the next day, July 31, the Stock Exchange was closed and it remained closed; but on November 18 there was a special settlement day which was appointed by the Committee of the Stock Exchange for closing all bargains which had been opened and which remained unclosed because of what had been done; that is to say, the day for the settlement for the shares which had been bought was virtually adjourned by what was done by the Committee of the Stock Exchange to November 18, when the money would normally have become due from the appellant to the respondent. On November 18, therefore, the appellant had to pay for the shares, and the respondent, as his broker, who as between himself and the jobber from whom he had bought was the principal, had to pay the jobber at the risk of being declared a defaulter.

Under these circumstances two days before November 18 the respondent sent in an account showing the amount due from the appellant, and the appellant was called upon to pay the purchase-

money. The appellant did not agree with the contention of the respondent that he was entitled to call upon him to pay the money; he said that in the ordinary course, having regard to what had happened, more time must be given. The respondent did not agree with that view, but acted upon what he conceived to be his rights, and, having paid the jobber by pledging the shares to his bankers and getting the money in order to take up the shares, he resold, and on November 23 the sale was carried out, the price realized for the shares being 159*l.* as against about 165*l.*, which was the original price. The appellant contends that he is not liable for the difference on that resale and that the broker was wrong in doing what he did. Now whether he was wrong in doing what he did turns upon the provisions of the Courts (Emergency Powers) Act, and particularly upon s. 1, sub-s. 1 (*b*). The terms of that Act are material, and I will read them: "no person shall . . . . levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this sub-section applies, for the purpose of enforcing the payment or recovery of any sum of money to which this sub-section applies, or, in default of the payment or recovery of any such sum of money, except after such application to such Court and such notice as may be provided for by rules or directions under this Act."

Now the first question is whether the broker can be said, as is suggested, to have wrongly entered into possession in contravention of the first part of the words I have read; and the second question is whether he is in the position of a mortgagee in possession whose right to realize his security is saved.

My Lords, I do not think that the broker entered into possession "for the purpose of enforcing the payment or recovery of any sum of money to which this sub-section applies, or in default of the payment or recovery of any such sum of money." If the facts are looked at it is plain that he did not. The broker entered into possession simply by taking delivery of the shares from the jobber, which he was not only entitled but bound to do. He paid for them himself with his own money and his title to them was derived from the jobber. No doubt he bought them as the agent of the appellant,

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but his entry into possession was due to the mechanism provided by the Stock Exchange, and not to any entry for the purpose of enforcing payment as against the appellant. Whether the appellant had paid or not, the transaction would have been followed out in the same fashion, and the broker would have got possession of the shares. Therefore the first point is a point upon which the appeal must fail.

I now come to the second point. The second point is this. It is said that, although in possession, the broker was not a mortgagee. My Lords, this matter has been under discussion in the Court of Appeal in the case of *Ziman* v. *Komata Reefs Gold Mining Co.* (1) a very short time ago, and I agree with the view that was there taken, that " mortgagee " must be read in a sense which does not confine it to the mere case of a legal mortgage where there has been a conveyance. For example, it would be extraordinary if we were to hold that merely because the legal estate in land was outstanding, and what was conveyed was merely an equitable estate, there was no mortgage within the section ; and it would be to my mind equally extraordinary to hold that a mortgage can only arise by way of conveyance. The deposit of title deeds with bankers makes the bankers mortgagees in the eye of a Court of Equity, and I see no reason for reading the section in such a way as to restrict a reading of it which would include that case, or as limiting it to mortgages of real estate. My Lords, it appears to me that where a person is in possession of securities with a lien over them as against the person for whom he has bought them, and by whom he is entitled to be paid for the liabilities which he has incurred, and that lien gives him the right to sell in order to realize his security, as was the case here by virtue of the rules of the Stock Exchange, that person is in the position of a mortgagee in possession under the section who has a right to sell which is not touched by the enactment of the section.

My Lords, if that be so the second point that was argued by the appellant fails, and under these circumstances I am of opinion that the appeal must be dismissed with costs.

LORD SUMNER. My Lords, I agree that the appeal must fail. The transaction is one of a familiar type. When the broker took up the shares from the jobber and paid for them himself he was doing so

(1) [1915] 2 K. B. 163.

not only in fulfilment of his own obligations, but of those of his customer. When he received the title deeds to the shares—the subject of the purchase—in the form of certificates to bearer, which, as is common, are certificates in the name of a particular shareholder who then indorses the shares in blank on the back, he was receiving them in accordance with the implied terms of the transaction, so that by the receipt of possession of them he acquired the well-known right to sell them in certain events for his own indemnity. That being so, I am satisfied on the facts of the case that this was a sale by a mortgagee in possession, and that the possession was received not in any such way as to bring it within the words " take, resume, or enter into possession of any property " within s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914. I assume that in selling the shares the broker was realizing the security, without expressing any further opinion about it and particularly without expressing any opinion as to the argument which seems to have weighed with Sankey J. at the trial.

It seems to me that there is no more to be said upon the construction of the section, which alone has been argued before your Lordships—all other points taken in the Courts below having been very properly abandoned—except this : that the two ingenious points which were raised by the appellant in his argument—the one turning upon the words providing for the application of this Act to Scotland, and particularly the application of expressions about mortgages to Scotland, and the other turning upon the contrast between the two parentheses in this section—are arguments which, though ingenious, do not avail the appellant. They really restrict the application of the enactment in England in a manner that is neither reasonable nor intelligible, and read into the second parenthesis after the words " mortgagee in possession " the words " on or before the passing of this Act." Neither construction is in my opinion possible.

Lord Parmoor. My Lords, I agree. The appellant made it quite clear in the course of his argument that he could not succeed except on the terms of the Courts (Emergency Powers) Act, 1914. On the construction of s. 1, sub-s. 1 (*b*), of that Act I think that the respondent did not enter into possession for the purpose of

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enforcing the payment or the recovery of a sum of money from the appellant. I think also that the sale by the respondent was a sale by a mortgagee in possession, and that the special powers of the Courts (Emergency Powers) Act, 1914, have no application. The contention that a mortgage is limited to a legal mortgage, or merely to a mortgage of real property or real estate, is, in my opinion, untenable. The appellant has failed to make good his argument.

LORD WRENBURY. My Lords, I agree, and I find it unnecessary to add anything to what has already been said by your Lordships.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 8, 1916.

Solicitors for appellant: *Timbrell & Deighton.*
Solicitors for respondent: *Morley, Shirreff & Co.*

[HOUSE OF LORDS.]

H. L. (I.)* 1916 *April* 11.

CONSIDINE AND ANOTHER . . . . . APPELLANTS;

AND

McINERNEY . . . . . RESPONDENT.

Workmen's Compensation—Amount of Weekly Payment—"Payment, allowance, or benefit"—Civil Servant—Superannuation Allowance and Gratuity under Superannuation Acts, 1834–1909—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 9; *Sched. I., par.* 3.

An attendant at a lunatic asylum employed subject to the regulations of the Civil Service Commissioners was permanently incapacitated by an injury sustained by accident arising out of and in the course of his employment and was retired in consequence of his incapacity. He was then aged forty-eight and had been in his employment for twenty years. Under the Superannuation Acts, 1834—1909, he was entitled to expect on retirement at the age of sixty, or before that age in the case of bodily or mental infirmity, a superannuation allowance and a lump sum by way of

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* *Present:* LORD BUCKMASTER L.C., EARL LOREBURN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

gratuity calculated on the basis of the number of years which he had served, but he had no legal right to these payments, and on his retirement he duly received a superannuation allowance and gratuity from the asylum authorities. Upon a claim for compensation under the Workmen's Compensation Act, 1906:—

Held, that the superannuation allowance and gratuity were payments, allowances, or benefits within par. 3 of Sched. I. to which regard should be had in fixing the amount of the weekly compensation.

Decision of the Court of Appeal in Ireland [1916] 2 I. R. 193 reversed.

APPEAL from an order of the Court of Appeal in Ireland discharging an award of the Recorder of Dublin under the Workmen's Compensation Act, 1906, and remitting the case to him for rehearing. (1)

On November 16, 1893, the respondent was appointed an attendant at the Central Criminal Lunatic Asylum, Dundrum, Dublin, subject to the regulations of the Civil Service Commissioners, and he continued in that employment till July 24, 1914. By the terms of his employment he came within the provisions of the Superannuation Acts, 1834—1909, as to pensions. On December 10, 1913, he sustained an injury to his shoulder by accident arising out of and in the course of his employment, and as a result of the injury was suffering from permanent partial incapacity. At the date of the injury he was in receipt of salary and allowances amounting to 1*l.* 18*s.* 3*d.* a week. He was then aged forty-eight. On July 24, 1914, having regard to the certificates of medical men as to the respondent's physical condition resulting from the accident, he was retired as being incapacitated for further service from his employment at the asylum, and upon his retirement was paid a sum of 62*l.* 7*s.* as a gratuity by the asylum authorities and was further granted a superannuation allowance or pension of 21*l.* 15*s.* per annum.

By the Superannuation Act, 1834 (4 & 5 Will. 4, c. 24), ss. 9 and 10, provision was made for the payment of superannuation allowances to officers and clerks of the Civil Service upon a certain scale and subject to certain conditions as to age and infirmity, but these provisions were repealed by the Superannuation Act, 1859 (22 Vict. c. 26), and the scale and conditions altered as hereinafter mentioned.

(1) [1916] 2 I. R. 193.

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Sect. 30 of the Superannuation Act, 1834, was as follows :—

" Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services, or to any superannuation or retiring allowance under this Act, or to deprive the commissioners of His Majesty's Treasury, and the heads or principal officers of the respective departments, of their power and authority to dismiss any person from the public service without compensation."

By the Superannuation Act, 1859, s. 2, the superannuation allowance to be granted to persons in the permanent service of the State was to be on the following scale :—

" To any person who shall have served ten years and upwards, and under eleven years, an annual allowance of ten-sixtieths of the annual salary and emoluments of his office :

" For eleven years, and under twelve years, an annual allowance of eleven-sixtieths of such salary and emoluments :

" And in like manner a further addition to the annual allowance of one-sixtieth in respect of each additional year of such service, until the completion of a period of service of forty years, when the annual allowance of forty-sixtieths may be granted ; and no addition shall be made in respect of any service beyond forty years : "

Sect. 10 : " It shall not be lawful to grant any superannuation allowance under the provisions of this Act to any person who shall be under sixty years, unless upon medical certificate to the satisfaction of the Commissioners of the Treasury that he is incapable, from infirmity of mind or body, to discharge the duties of his situation, and that such infirmity is likely to be permanent."

The Superannuation Act, 1887 (50 & 51 Vict. c. 67), s. 1, authorized the Treasury to grant to any person employed in the Civil Service of the State who was injured (*a*) in the actual discharge of his duty, and (*b*) without his own default, and (*c*) by some injury specifically attributable to the nature of his duty, a gratuity or annual allowance to be regulated by a warrant to be framed under that section, and subject to the limitation as to amount provided by the section.

By the Superannuation Act, 1909 (9 Edw. 7, c. 10), s. 1, sub-s. 1, the proportion of the annual salary on which the scale of the super-

annuation allowances to be granted to civil servants who entered the service after the passing of the Act was to be calculated was to be one-eightieth instead of one-sixtieth, and by sub-s. 2 the Treasury was empowered to grant by way of additional allowance to any such civil servant on retirement, in addition to any superannuation allowance to which he might become entitled, a lump sum equal to one-thirtieth of his annual salary multiplied by the number of completed years he had served, so, however, that the additional allowance should not exceed one and a half times the amount of his salary.

By s. 3 an option was given to civil servants who had entered the service before the passing of the Act to adopt the provisions of the Act subject as therein provided.

The respondent had exercised this option, and the superannuation allowance and gratuity in question were calculated according to the scale provided by this Act.

The appellants were inspectors of lunatics.

On November 7, 1914, the respondent filed a request for arbitration under the Workmen's Compensation Act, claiming 19*s.* 3*d.* per week as compensation from the appellants. The appellants by their answer pleaded that the gratuity and superannuation allowance were payments, allowances, or benefits to which regard should be had under par. 3 of Sched. I. of the Act in fixing the amount of the weekly compensation to be awarded to the respondent.

The recorder awarded the applicant (the respondent) 9*s.* 6*d.* a week until further order and stated that in doing so he had had regard to all the proved circumstances, " including the fact that the applicant has (though not the amount of it) a pension from the employment."

The Court of Appeal (O'Brien L.C., Moriarty and Ronan L.JJ.) discharged the award and remitted the application to the recorder for rehearing, with a direction that in fixing the amount of compensation the pension and gratuity should not be taken into account.

1916. March 6. *James O'Connor, S.-G. for Ireland,* and *G. A. H. Branson* (with them *John M. Fitzgerald* (of the Irish Bar)), for the appellants. In fixing the amount of compensation payable to the respondent regard should be had to this pension. It is a " payment, allowance, or benefit " within par. 3 of Sched. I. of the Workmen's Compensation Act as interpreted by this House in *McDermott* v.

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Owners of S.S. Tintoretto. (1) This pension is given to the respondent because of his incapacity and during the period of his incapacity, i.e., for life. There is nothing in the scheme of the Superannuation Acts to give a civil servant any legal right to a pension, which cannot therefore be properly treated as deferred pay. The Treasury might have proceeded under the Act of 1887, but they did proceed under the Act of 1859 as amended by the Act of 1909. Under the Act of 1859 they had no power to grant a pension to any person under sixty years of age except in the case of bodily or mental infirmity. The bodily infirmity in this case was the result of the accident and the pension is antedated by reason of that bodily infirmity. This antedated pension is therefore a payment in respect of the injury which ought to be taken into account under par. 3 of Sched. I.

E. A. Swayne (of the Irish Bar), for the respondent. This is not a payment in respect of the incapacity, but is a payment in respect of the number of years' service which the servant has performed. It is true that the respondent could not have got his pension at the time he did but for the incapacity, but it is none the less a reward for past services. If it were a payment in respect of the injury it would be commensurate with the injury, whereas the measure depends on the number of years' service. Under the Superannuation Act of 1887 a scheme of compensation was inaugurated, but after the passing of the Workmen's Compensation Act, 1906, this scheme was abrogated in cases covered by the later Act by a Treasury warrant dated August 21, 1907, in pursuance of s. 9, sub-s. 2, of that Act, and the matter was left to be dealt with by the Act.

Sect. 5 of the Superannuation Act, 1859 (which was repealed and replaced by the Superannuation Act, 1887), provided for the granting of allowances in the case of bodily injury, but upon the appellants' construction of s. 2 there was no object in inserting a provision for compensation for injuries, and s. 5 was superfluous. A civil servant has a right to a pension, or, if not a right, an expectation so certain that every one would act upon it, and the Superannuation Act, 1909, speaks of the civil servant as "entitled" to a superannuation allowance: s. 1, sub-s. 2; s. 2, sub-s. 2; and speaks also of his "right" to a superannuation allowance: s. 3, sub-s. 2. Further, the pension is considered by the workman on entering the employment and may

(1) [1911] A. C. 35.

be a ground for his accepting a lower rate of wages, and in that sense it may be said to be earned by the workman.

O'Connor, S.-G. for Ireland, replied.

The House took time for consideration.

April 11. LORD BUCKMASTER L.C. My Lords, this case raises for determination a point under the Workmen's Compensation Act, 1906, at once novel and important.

The respondent was injured on December 10, 1913, in the course of his employment as an attendant at the Central Asylum, Dundrum, county Dublin, where he had served since November 16, 1893, under the regulation of the Civil Service Commissioners. His injury is permanent and prevents the possibility of his continuing to discharge his duties. He was accordingly retired from the employment of the asylum on July 24, 1914, and, on such retirement, received a gratuity of 62*l.* 7*s.* and a superannuation allowance or pension of 21*l.* 15*s.* per annum.

The Workmen's Compensation Act, 1906, is, by s. 9, made applicable to workmen employed by or under the Crown in any capacity other than that of naval or military service. The respondent accordingly, upon his injury, became entitled to compensation under the statute. In due course he caused a request for arbitration under the Act to issue in the Court of the Recorder of Dublin against the appellants, and, on the hearing of this application, an award was made on January 6, 1915, awarding him 9*s.* 6*d.* a week as from July 24, 1914, until further order. In fixing this sum the recorder states that he had regard to all the proved circumstances, including the fact that the respondent had a pension from the asylum authorities, though he says that he did not take into account the amount of the pension. The respondent appealed from such award to the Court of Appeal, who set the award aside and remitted the matter to the recorder upon the ground that the pension represented a payment out of money which the workman must be taken to have saved out of his earnings. From that judgment the present appeal has been brought by the inspectors of the lunatic asylum, and its determination depends upon the meaning that ought to be attached to certain words contained in par. 3 of Sched. I. of the statute. By s. 1 of the

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Act the liability of the employer to make compensation is to be regulated by the provisions of this schedule, subject to certain exceptions not material for the present purpose, and the relevant words of par. 3 of the First Schedule are these: "In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." There can be no doubt that the pension received by the respondent is within the scope of this wide and unqualified language; but the sense of the statute requires the imposition of some restriction, as this House declared in the case of *McDermott* v. *Owners of S.S. Tintoretto*. (1) It was there decided that debts owing from the master to the workman and the payments which under the Merchant Shipping Act a shipowner is bound to discharge in favour of a seaman in his service were not within the meaning of the words in the schedule. The respondent seeks to impose a further limitation and asserts that, to be included, the payment must be one voluntarily made by the employer and arising entirely out of his bounty or compassion. The pension and the payment granted by the asylum authorities are, he asserts, not payments of this description, but payments to which he is entitled, to which he has a right, although that right is not of a character that could be enforced by any legal proceedings. It is, I think, desirable to state the provisions of the various Acts under which this pension arises, in order that the true position of the respondent under these statutes may be ascertained before testing the soundness of this contention.

By the Superannuation Act, 1834 (4 & 5 Will. 4, c. 24), it is provided (see s. 9) that superannuation allowances to be thereafter granted shall not exceed certain proportions set out in ss. 9 and 10 of the statute and measured according to years of service.

(1) [1911] A. C. 35.

By s. 11 no pension may be granted to any officer or clerk under the age of sixty-five unless it appears on the certificate of the head of his department and of two medical practitioners that he is incapable from infirmity of mind or body of discharging the duties of his post; by s. 27 certain abatements are made from the salary and emoluments of the persons employed in the several offices specified in the schedule to the Act in order to reduce the charge incurred in providing the allowances. In this section for the first time in the Act a reference is made to persons "entitled to superannuation allowance under this Act," but I am unable to regard these words as anything but a description of the class of persons to whom the superannuation allowances would be paid, and indeed by s. 30 it is expressly provided that nothing in the Act shall be construed to give any person an absolute right to compensation for past services or to any superannuation or retiring allowance under the Act. By an Act passed in 1857 (20 & 21 Vict. c. 37), s. 27 of the earlier Act was repealed, so that thereafter the provision of the pension was entirely independent of any money actually retained or received out of the salary or emoluments of the officers or clerks.

In 1859, by 22 Vict. c. 26 (the Superannuation Act, 1859), a different scale was imposed from that provided by the Act of 1834, and by s. 10 sixty was substituted in the place of sixty-five as the age below which superannuation allowances should not be granted unless upon medical certificate that the recipient is incapable from infirmity of body or mind of discharging the duties of his situation and that such infirmity is permanent.

By the Superannuation Act of 1887 independent provision was for the first time made for the case of a person injured in the discharge of his duty, and by s. 1 it was enacted that in such a case the Treasury might grant the person injured such gratuity or annual allowance as they might consider reasonable, with a provision that the gratuity should not exceed one year's salary and an allowance should not, "together with any superannuation allowance to which he is otherwise entitled, exceed the salary of the person injured, or three hundred pounds a year, whichever is less"; but this provision is again guarded by s. 9, which makes the decision of the Treasury final as to the amount of any allowance or gratuity under the Act. Sect. 10 is relied on by the respondent; but though s. 10 says that

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" nothing in this Act shall be construed so as in any way to interfere with the rights existing at the passing of this Act of any civil servant then holding office," those rights were never of such a character as could enable a civil servant to compel their enforcement in his favour.

Warrants were duly issued under this Act to establish the scale of payments that the Treasury were prepared to make for injuries, and these continued until 1906, when the passage of the Act under consideration changed the position of the civil servant receiving injuries arising out of and in the course of his employment from that of a person entitled to expect the exercise of statutory powers in his favour to that of one entitled to assert a statutory right to compensation against his employer.

The Act of 1909 (9 Edw. 7, c. 10) has not altered the fundamental position established by the earlier Acts, for on the one hand it merely changed the rate of allowance from one-sixtieth of the salary a year to one-eightieth, and on the other enabled the Treasury to make an additional allowance by way of a lump sum calculated by one-thirtieth of the salary multiplied by the number of years served ; and in this Act again in s. 3 reference is made to the right to superannuation allowance of a civil servant. In this Act power was given to a civil servant who entered the service before 1909 to elect to receive his pension under the Act, and this election the respondent exercised. His position, therefore, under the statutes may be summarized as follows :—

He was entitled to expect an annual allowance at the rate of one-eightieth for every year of service which he had served, and a lump sum down, but such allowance would not begin before sixty unless upon medical certificate that he was by reason of bodily infirmity permanently unable to continue his work. This expectation, though it might be relied on with full certainty, was none the less not a legal right, and no claim for it could be enforced by any legal proceedings. In the present case, on the certificate being forwarded to the Treasury as to the permanent incapacity of the respondent, a gratuity or allowance was paid to him under s. 1 of the Act of 1909, and a superannuation allowance was granted representing twenty-eightieths of his salary, he having served for twenty years. Now this pension could not have been granted at the age when the

respondent received it but for the fact of his having become physically infirm, and that infirmity was due to his having been injured in the public service. The occasion, therefore, on which the pension was payable was inseparable from his injury. He had not directly contributed any money at all to the funds out of which the payment was made, and the only manner in which he could be said to have indirectly contributed would be by establishing that he had accepted a lower salary than such services as he could offer would command in the open market, by reason of the fact that he was entitled to expect the payment of the pension, either in the event that happened or on his attaining the age of sixty years.

There seems to have been no evidence whatever tendered for the recorder to establish this suggestion, and it may have been very difficult to prove. In these circumstances it is, to my mind, unreasonable to say that regard was not to be had to the payment which the respondent received from his employer in determining the amount of compensation to which he was entitled under the Workmen's Compensation Act ; and the recorder was, in my opinion, right in taking such payment into account. I have carefully considered the words of the schedule in order to see if any limitation can be placed on these words which would exclude such a payment as the one in question from their operation ; but I have been unable to discover any rule or principle by which such limitation could be imposed.

EARL LOREBURN. My Lords, the Workmen's Compensation Act, 1906, directs the arbitrator that " in fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity." In the present case the workman receives a pension from his employers, for the Asylum Board and the Treasury have been regarded by both sides as one and the same. He had no legal right to claim it, but he had an expectation practically amounting to a certainty of obtaining it at the age of sixty, and even before sixty, if he should get a medical certificate that he was incapable from infirmity of mind or body. He got the certificate and received a pension at the age of forty-eight on a lower scale than he would have received at the age of sixty. It was granted by the

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Treasury under statutory powers. There is no doubt that the incapacity was due to an injury by accident which brought him within the Workmen's Compensation Act. In fixing the amount of the weekly payment which the workman was to receive under that Act the arbitrator had regard to this pension. The Court of Appeal decided that he was not entitled to have regard to it. And that raises the point which we have to settle.

With all respect to the Court of Appeal, I think the arbitrator was right. This payment came from the employer. The employer was not obliged by statute to pay it, and in my opinion it would have made no difference had he been so obliged. It is an error to say that the workman contributed toward the pension. It came wholly out of the employer's pocket.

Under this Act the employer is the person required to pay compensation (s. 1), and it is in ease of this burden on the employer that the arbitrator is directed that regard shall be had to any payment, allowance, or benefit which the workman may receive from him (Sched. I., par. 3). These words are quite general, but it is obvious there must be some limitation, or the declared purpose of the Act will be frustrated. They can refer only to what the workman receives in respect of the incapacity. If that were not so, then the employer might be relieved of his statutory burden by the accident that he had given to the workman some money or some benefit for a perfectly different purpose, or connected with a perfectly different duty. Again these words can refer only to payments, allowances, or benefits that come from the employer's own resources. If that were not so, then money which the employer might pay out of a fund, for example, of which he was manager, might enable him to diminish the burden which the statute places on himself. He must himself be the poorer for the payments, or the arbitrator cannot have regard to them. These limitations are fairly clear.

Your Lordships were asked to say that the employers were, in effect, obliged to pay the pension in the present case, though not in law bound to do so, and that therefore it could not be regarded in fixing the weekly payment. I do not understand how they could be obliged yet not bound. But even if they had been compelled to pay this pension I am of opinion that the arbitrator would still have been right in having regard to it. It was a payment out of their funds in

respect of the incapacity. It is not necessary for giving full effect to the Act that the payment should be a voluntary payment, and the Act does not say so. Why should we say so ?

We were also asked to say that the workman had, in substance, purchased this pension because he would naturally take less wages in view of the prospective advantage of receiving it if he should be incapacitated. I think that, even if the employers had contracted to pay the pension and the workman had accepted the employment at less wages expressly for that reason, the arbitrator would still have been required to have regard to the pension in fixing the weekly payment. It is, none the less, money out of their pocket that they had prospectively received value for their promise to give the pension if the contingency should arise.

I can see this means that the workman will be in a slightly worse position if he insures against accidents with his employer than if he insures with some other person or company. In practice I do not suppose such a thing is common. If a payment or pension came from a fund to which the employers had contributed it would not be a payment from those employers at all. The money they had contributed would be no longer their money and it could not be so regarded by the arbitrator. Whatever difficulty there may be in applying the words of the schedule arises, perhaps necessarily, from their generality, but we cannot restrict them unless the Act requires a limitation by what it says elsewhere. And I do not think practical hardship will arise from a logical interpretation. The arbitrator has a discretion as to the degree to which he will regard payments, benefits, and allowances, and can look at all the circumstances in exercising his discretion. That provides a useful safety-valve.

LORD ATKINSON. My Lords, in this case the respondent, who was employed as an attendant in the Central Asylum at Dundrum in the county of Dublin, at a salary which, with allowances, amounted to about 1*l.* 18*s.* 3*d.* per week, received an injury arising out of and in the course of his employment which resulted in partial incapacity, permanent in character, to discharge his duties.

By reason of this incapacity he became enabled to retire from the service of the asylum on a pension long before he had reached the age of sixty years.

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The pension awarded to him amounted to 21*l.* 15*s.* per annum, or about 8*s.* 3*d.* per week, plus a gratuity of 62*l.* 7*s.*

It is admitted that he had no legal right to recover either of these sums. In that sense they are gratuities, paid out of the bounty of the Crown, though presumably they were looked forward to and taken into account by the employee as benefits he was likely to receive when he entered the service. In like manner the benefits conferred on him by this very Act of 1906 itself may also be taken into account. There is no evidence that, in fact, any diminution of the employee's salary took place, or that any deduction from it was, in fact, made in respect of his prospect of obtaining a pension or a gratuity either at sixty years of age or in the event of his becoming incapable of performing his duties at an earlier period. In the absence of that evidence I do not think it is legitimate to infer that the employee purchased and paid for either his pension or the gratuity by his own labour.

The Court of Appeal in Ireland have, however, decided that, in fixing the compensation payable to the respondent under the Workmen's Compensation Act of 1906 in respect of the incapacity arising from the injury he has received, his pension and the gratuity given to him should be entirely ignored, and the same weekly sum be awarded to him as if no pension or gratuity had, in fact, ever been granted to him. The principle upon which this decision is apparently based is, as I understand it, this: that the respondent by his labour, while he served, either bought this pension and gratuity, or bought the chance of obtaining them; that they, in truth, resembled deferred pay; that the remuneration for the respondent's labour, while he served, was his weekly wages plus this pension and gratuity, or plus the chance of obtaining them, whichever it be. If the reasoning which leads to that conclusion be sound, it would follow that if an employer contracted with a workman at the time of hiring that, in the event of the latter's being totally incapacitated by an injury by accident arising out of or in the course of his employment, he, the employer, would pay his workman during the time that total incapacity should last a weekly sum equal to 50 per cent. of the average weekly wages he was receiving before the accident, or in the case of only partial incapacity arising from the accident would pay him during that incapacity a weekly sum

equal to the difference between these same average weekly wages and the wages the workman was earning, or could earn, in an employment suitable to his impaired powers, this contract and the performance of it by the employer should be equally ignored in fixing the workman's compensation under the Act. Indeed, this, as I understood, was insisted on in argument by the learned counsel who appeared for the respondent on the hearing of this appeal. So this strange result would follow, that though the workman, when he enters into his employment, must be fully cognizant of the vast benefits conferred upon him by the Act of 1906, and must, according to the contention, be presumed to accept lesser wages because of them, a contract by which he is to receive from his employer the maximum he could be awarded under the statute is to be ignored, and he is to receive that maximum plus such sum as the arbitrator may consider sufficient, but that if no such contract were entered into he would receive the latter sum only. That is, however, a conclusion as illogical as it is unjust and oppressive to the employer, yet every argument urged to show that the workman presumably accepted lower wages by reason of the benefits secured by this supposed contract, and therefore purchased by his labour the benefit resulting from its performance, is equally applicable to show that he accepted lower wages by reason of his chance of receiving under the statute such sum as the arbitrator might think it right to award to him. If the workman has by his labour purchased the benefit under the contract and it is his own, he has equally by his labour purchased the benefit under the statute and it is his own. He has, in effect, paid his employer for it, and the burden of paying compensation to the workman would not, in the result, fall upon the employer, as is designed by the statute that it should, but upon the workman himself. In order not to defeat the statute the arbitrator should do what, in fact, he has no power to do, namely, award to the workman at least double the sum to which he thinks he is entitled, so that the employer's proper burden may fall upon him. The unsoundness of the contention is thus shown by the absurd result to which it leads. All the provisions of Sched. I. attached to the Act are conversant solely with the amount of the compensation which the employer is by the 1st section of the statute made liable to pay to the workman in respect of the personal injury sustained by the latter. It is obvious,

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therefore, that the "payment, allowance, or benefit to be taken into account" to diminish the amount of that compensation, to be treated in effect as part payment of the compensation, should be paid, made, or conferred at the expense of the person liable to pay the compensation, namely, the employer, and be given in respect of that for which the compensation is to be awarded, namely, the injury received by the workman. The opening words of par. 3 of the schedule must be read in this restricted sense, as was decided in *McDermott* v. *Owners of S.S. Tintoretto.* (1) The principle it embodies is, I think, precisely the same as that embodied in s. 7, sub-s. 1 (*e*), of the statute. It is in my view this: since the workman, as has been often decided in this House, is to be compensated under this Act, not for the pain or suffering he has endured, but for the loss of his capacity to earn wages, the employer is not liable to compensate him for that loss twice over to any extent whatever. If the workman should insure himself with some insurance company against loss sustained by an injury from such an accident as the statute contemplates, any sum he might receive from the company when that loss accrued could obviously not be had regard to. I think it would make no difference if the workman should make his employer his insurer, paying the latter, or allowing him to deduct from his, the workman's, wages, a sum equal to the premium proper to be paid according to the ordinary actuarial principles on the amount insured. In that case the sum received by the workman should equally be ignored. There might well be a third case where the employer contented himself with deducting from the workman's wages a sum less in amount than the premium above mentioned, the employer himself, in effect, making up the balance. In such a case the insurance would be effected for the workman's benefit at the joint expense of his employer and of himself. This expenditure upon the part of the employer should, in my view, to some extent be had regard to under the words of par. 3. No rule, I think, can be laid down as to the precise amount by which the weekly payments awarded should be diminished in respect of it. That is altogether a matter for the decision of the arbitrator. In my view, however, a decision that this payment by the employer must, in fixing the compensation, be ignored by the arbitrator would be wrong in law. There is no

(1) [1911] A. C. 35.

evidence whatever before your Lordships in this case to show whether any fund is provided for the payment of pensions or gratuities to officers of the Civil Service (such as the respondent) to which these officers themselves contribute, or, if so, whether a grant in aid is made by the State to enable the claims upon the fund to be met.

There is nothing, therefore, to show whether this case at all resembles the third case above mentioned. The question for decision, accordingly, narrows itself down to this: Were the pension and gratuities in this case granted to the respondent at the expense, to any extent, of his employer, the State, and in respect, to any extent, of the injury he received in his employment? If they fulfilled these two conditions the direction to the arbitrator to ignore them altogether was, in my opinion, wrong.

By s. 8 of the Superannuation Act of 1909 it is provided that it is to be read as one with the Superannuation Acts of 1834 to 1892. The respondent apparently took advantage of the privilege conferred upon him by the 3rd section of the first-mentioned Act and adopted the provisions of that statute. The statute of 1834 (4 & 5 Will. 4, c. 24), by its 27th section provided that, in order to reduce the charge for pensions, a sum of $2\frac{1}{2}$ per cent. should be deducted from the salaries amounting to 100*l.* of the civil servants therein mentioned and of 5 per cent. from salaries of a higher amount. That section was repealed by the 20 & 21 Vict. c. 37, and no similar provision has been introduced into any of the subsequent Superannuation Acts. The Act of 1834, like that of 1859, provided a scale according to which the amount of any pensions granted should be measured.

The latter statute by s. 2, still unrepealed, provided that, subject to certain exceptions, the scale should, in cases such as the present, be as follows (that is to say): "To any person who shall have served ten years and upwards, and under eleven years, an annual allowance of ten-sixtieths of the annual salary and emoluments of his office: For eleven years, and under twelve years, an annual allowance of eleven-sixtieths of such salary and emoluments: And in like manner a further addition to the annual allowance of one-sixtieth in respect of each additional year of such service, until the completion of a

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period of service of forty years, when the annual allowance of forty-sixtieths may be granted ; and no addition shall be made in respect of any service beyond forty years : Provided always, that if any question should arise in any department of the public service as to the claim of any person or class of persons for superannuation under this clause, it shall be referred to the Commissioners of the Treasury, whose decision shall be final."

And by its 10th section it is provided that it should not be lawful to grant any superannuation allowance under that Act to any person under sixty years of age unless upon a medical certificate to the satisfaction of the Treasury that he was incapable from infirmity of body or mind to discharge the duties of his situation, and that such infirmity was likely to be permanent.

By the Superannuation Act of 1887 a further change was made in the law which does not, however, affect this case.

The respondent's case is rested on the 10th section of the Act of 1859, and accordingly he has, long before he reached sixty years of age, been granted an allowance and a gratuity because he has, by an injury through accident met with while he was discharging the duties of his employment, and arising out of the discharge of those duties, been rendered incapable of further discharging them. That is the very kind of incapacity for which he would be entitled to be compensated under the Workmen's Compensation Act of 1906. This incapacity is the very thing which secures to him his pension and gratuity ; they will be paid to him as far as appears at the expense of his employer, the State, and though the amount of the pension will still be measured by his years' service according to the scale, yet it is in my view clearly given to him at the early date it is given in respect of the very incapacity to which the Act of 1906 and par. 3 of the schedule applies. In my opinion, therefore, the decision appealed from is erroneous and should be reversed and this appeal be allowed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I concur. The respondent, Thomas McInerney, was an attendant in the Central Asylum, Dundrum, in the county of Dublin, This asylum was established under the provisions of the Lunatic Asylums of Ireland Act, 1845. By the terms of the appointment of the

attendants, and by arrangements duly made, these attendants come within the scope of the provisions of the Superannuation Acts, 1834—1909.

On December 10, 1913, the respondent sustained an injury arising out of and in the course of his employment; and this injury has unfortunately caused him to be permanently although only partially incapacitated. He has obtained from the Recorder of Dublin a certain award under the Workmen's Compensation Act, 1906. He had, however, previously also obtained, consequent upon his retirement owing to his incapacity, a superannuation allowance or pension from the asylum authorities of 21*l.* 15*s.* per annum, and in addition a lump sum of 62*l.* 7*s.* by way of gratuity from these authorities.

The question in the case is whether the learned Recorder of Dublin, in making an award to the injured man, was right in having regard to the gratuity and allowance paid and made to him by his employers, the asylum authorities. The recorder was of opinion that he should "have regard" thereto. My view, in a word, is that in this the learned judge was following the statute. The opposite view was, however, sustained by the Court of Appeal in Ireland, and I am humbly of opinion that the judgment of that Court cannot be supported in law.

Put broadly, the situation was this: The respondent's wages had been 38*s.* 3*d.* per week. Accordingly, if there had been no question as to making a deduction of any payment, allowance, or benefit from his employers, and had the case been treated as an ordinary one and an award made on the maximum scale permitted by the Workmen's Compensation Act, he would have received a little over 19*s.* per week. That would have been the extreme measure of his rights under the statute against his employers. And that amount is what was claimed under arbitration proceedings. He, however, is in receipt of 21*l.* 15*s.* per annum, which is equal to about 8*s.* 4*d.* per week. In addition to this a gratuity of 62*l.* 7*s.* actuarially estimated on the life of a man of his age, namely, fifty, is equal to a few shillings more. If the judgment of the Court of Appeal be right, the recorder should have been blind to all that. The partially incapacitated man would accordingly receive from his employers this pension and gratuity, the whole payments being considerably in excess of the

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maximum allowance contemplated and provided by the Workmen's Compensation Act.

What the learned recorder did was to take the whole circumstances into account, to have regard to the superannuation and gratuity, and to give an award of 9*s.* 6*d.* per week under the Act. I think that he was right in doing that: he was doing what the Act of Parliament prescribed.

By the First Schedule to the statute, which contains the scale and conditions of compensation, it is provided: "(3.) In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity." My Lords, these words as they stand would appear to cover the case, it being, of course, admitted that in any view the payment of what is given under the Superannuation Acts must be treated as received "from the employer during the period of incapacity."

I respectfully adhere to what I said in *McDermott's Case* (1), that the expression "payment, allowance, or benefit" must be considered in this way: (1.) that it must be a payment by way of allowance or benefit, and (2.) that it must be received from, by which I mean out of the resources of, the employer.

There is at once excluded accordingly from the category payment to the workman of moneys which are his own, and which may have been accumulating, let us suppose, in the employers' hands. The employers are in such a case no more than the holders or bankers for the workman, and he is on the occasion of incapacity occurring entitled to have his own back and thereafter to a settlement for his injuries. Under convenient arrangements such moneys would become instantly due by the employers to the workman; but they could never be treated as payments, allowances, or benefits from the employers' own resources, and therefore they could not form deductions from what is due under the Workmen's Compensation Act.

There are, however, two other stages, my Lords, which can be set out: (1.) The payment, allowance, or benefit may come out of a fund to which both workman and employers have in the past contributed. This is by no means an uncommon case. On the

(1) [1911] A. C. 35.

contrary, I believe it to be not infrequent. (2.) There is the case where a scheme of payment, allowance, or benefit is wholly set up by or on behalf of the employers. It is in my humble opinion the duty of the arbitrator, in both of these cases, to have regard to the payments, allowances, or benefits.

This latter case is, I think, substantially the nature of the arrangement for the superannuation of civil servants in the position of the respondent. For a short time it was not so in Ireland. For by s. 27 of the Superannuation Act, 1834 (4 & 5 Will. 4, c. 24), a certain deduction was made from the salaries of civil servants in order to establish at least pro tanto a superannuation fund. This section of the 1834 Act, however, was abolished by 20 & 21 Vict. c. 37.

My Lords, in the cases which I have mentioned—where there is no contribution or only a partial contribution by the servant—it appears to me to be fairly clear that not only the provisions but the principle of the Workmen's Compensation Act is this: that the arbitrator cannot be blind to the receipt of superannuation and gratuity, and that such things do fall within the scope of the words "payment, allowance, or benefit" contained in the Act. Otherwise, my Lords, very remarkable consequences might ensue. Employers, without having gone through the process of contracting out, may yet have had and have continued generous schemes by which injured workmen shall receive allowances in the case of incapacity; such allowances or pensions may be on the scale of a very considerable proportion of their former wages. The employers having duly put these pensioners on their lists of incapacitated workmen, the latter, so the argument runs, would be entitled to bring their action under the Workmen's Act and receive an award thereunder without the arbitrator having any regard to what the same workman was already entitled to and receiving from the same employer in respect of the same incapacity. This does not appear to me to be in accord with the policy or provisions of the statute.

My Lords, there is nothing in the case to suggest what appears to have been a controlling factor in the judgment of the learned judges of the Court of Appeal, namely, that the superannuation allowance and gratuity were, if not exactly, yet in the nature of, a payment to the civil servant of what had been contributed by him. Nor do

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I think it safe to approach such cases upon the principle of a conjecture as to what is the true nature of a pension itself, or whether it might not be denominated deferred pay.

Order of the Court of Appeal in Ireland reversed and award of the Recorder of Dublin restored: By consent no costs of the appeal to this House.

Lords' Journals, April 11, 1916.

Solicitor for appellants: *Treasury Solicitor, for Treasury Solicitor in Ireland.*

Solicitor for respondent: *Herbert Z. Deane, for James R. Cresswell, Dublin.*

[PRIVY COUNCIL.]

THE BELGIA.

J. C.*
1916
April 7.

ON APPEAL FROM THE HIGH COURT OF JUSTICE. PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(In Prize.)

Prize Court—Enemy Merchant Ship—Outbreak of War—Capture "in port" or "at sea"—Hague Peace Conference, 1907, *Convention VI., arts.* 1 *and* 2.

Arts. 1 and 2 of Convention VI. of the Second Hague Peace Conference, 1907, relative to the status of a belligerent merchant ship in an enemy port at the outbreak of hostilities, are applicable only to vessels within a "port" in the ordinary mercantile sense of the word, and have no application to vessels merely within the limits of a fiscal port.

Appeal from a judgment of the Prize Court (England).

The appeal was brought by the Hamburg-Amerika Line, the owners of the steamship *Belgia*, 8132 tons gross, which was condemned as lawful prize by the President of the Probate, Divorce, and Admiralty Division (Sir Samuel Evans) on June 14, 1915, in the circumstances which are fully stated in the judgment of their Lordships.

1916. March 2. *Sir Robert Finlay, K.C.*, and *Dumas*, for the appellants.

Sir Frederick Smith, A.-G., Butler Aspinall, K.C., and *C. R. Dunlop*, for the respondent.

In the course of the arguments, which sufficiently appear from the judgment, counsel for the appellants cited *Garston S.S. Co.* v. *Hickie & Co.* (1), *Hunter* v. *Northern Marine Insurance Co.* (2), *The Möwe* (3), and *The Erymanthos.* (4)

* *Present:* Lord Parker of Waddington, Lord Sumner, Lord Parmoor, Lord Wrenbury, and Sir Arthur Channell.

(1) (1885) 15 Q. B. D. 580.
(2) (1888) 13 App. Cas. 717.
(3) [1915] P. 1.
(4) (1914) 1 Br. & Col. P. C. 339.

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April 7. The judgment of their Lordships was delivered by

LORD PARMOOR. The question raised in this appeal is whether the steamship *Belgia* is entitled to the benefit of arts. 1 and 2 of Convention VI. of the Second Hague Peace Conference, 1907. The appellants are a German company, known as the Hamburg-Amerika Line. The master of the *Belgia*, which was bound from Boston to Hamburg, received information at about 9 P.M. on August 3, 1914, when off the Scilly Isles, that war had broken out between Germany and France. The master decided to deviate from the voyage to Hamburg and to go to the Bristol Channel, on the ground, as stated in his evidence, "because I was afraid of being captured by a French man-of-war." When off Trevose Head a Newport pilot was taken on board. The *Belgia* arrived off Newport in the afternoon of August 4, 1914, and, at about 5.50 P.M., proceeded as far as the Bell Buoy at the entrance to the river Usk. Among other places vessels are discharged at the port of Newport in the Alexandra Dock, which is approached by a dredged channel, at the entrance to which is the Bell Buoy. At this point the *Belgia* was stopped by the dockmaster and ordered to anchor off the English and Welsh lightship, in a position alleged to be within the fiscal port of Newport. On the afternoon of August 4 war had not broken out between Germany and England, and Newport was not an enemy port to a German vessel. Arts. 1 and 2 of Convention VI. only apply to merchant ships at the commencement of hostilities in an enemy port, or entering an enemy port whilst still ignorant that hostilities have broken out. Their Lordships, therefore, cannot hold that, when the *Belgia* reached Newport on the afternoon of August 4, arts. 1 and 2 of Convention VI. had any application. It was argued by counsel for the appellants that the dockmaster had no right to stop the *Belgia* at the Bell Buoy, but in the opinion of their Lordships the dockmaster was not exceeding the limits of his authority. There was no obligation to admit the *Belgia* to the Alexandra Dock, admission being a matter of courtesy and not of right.

On the morning of August 5, and after war had broken out between Germany and England, the *Belgia* was captured in the position described in paragraph 6 of the affidavit of the dockmaster as follows :—

"The position of the *Belgia* was then as follows : The English and

Welsh light vessel bearing about E.S.E. $\frac{3}{4}$ of a mile, and the Spit lay about N.E. 1 mile. She was, therefore, $3\frac{3}{4}$ miles from the Somersetshire coast, and 5 miles from the Bell Buoy (marking the mouth of the river Usk)."

It is proved in evidence that the position in which the *Belgia* was anchored at the time of capture is in an open roadstead, and that no cargoes are ever discharged or unloaded at or near this position, and that the only places at Newport where cargoes are discharged or unloaded are in the docks, or at wharves up the river Usk. In ordinary mercantile language, a merchant vessel in such a position would not be within the port of Newport. A port denotes a place to which merchant vessels are in the habit of going to load or discharge cargo, and not a place in an open roadstead at which no cargoes are ever discharged or unloaded. It was, however, argued on behalf of the appellants that the word " port " in arts. 1 and 2 of Convention VI. included not only a port in the ordinary mercantile sense, but a fiscal port, and that at the time of capture the *Belgia* was within the fiscal port of Newport.

It is not necessary to determine whether the *Belgia* at the time of capture was, in fact, within the fiscal port of Newport, since, in the opinion of their Lordships, arts. 1 and 2 of Convention VI. do not include vessels merely within a fiscal port. These articles are limited to merchant ships, and refer to commercial transactions, not to fiscal regulations. The word " port " is used not only in the collocation " enemy port," but of " a port of destination " and " a port of departure "—well recognized terms in the language of commerce. To extend the benefit of arts. 1 and 2 of Convention VI. to vessels within a fiscal port would be not only to interpolate a word not used in the articles, but to introduce a new test not relevant to their subject-matter and involving different considerations. That the scope of arts. 1 and 2 is commercial and not fiscal is further confirmed by the language of the preamble of the Convention. The parties to the Convention are not concerned with the fiscal regulations in any particular country, but " anxious to ensure the security of international commerce against the surprises of war, and to protect, as far as possible, operations undertaken in good faith and in process of being carried out before the outbreak of hostilities."

It is not necessary in this appeal to consider the questions which

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have arisen as to the conditions under which the provisions of arts. 1 and 2 of Convention VI. become applicable, since, assuming their applicability, the facts do not bring the *Belgia* within their benefit. In the opinion of their Lordships the *Belgia* was captured at sea, and is not entitled to the benefit of arts. 1 and 2. They will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Pritchard & Sons.*
Solicitor for respondent: *Treasury Solicitor.*

E. C. T.

[PRIVY COUNCIL.]

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THE MARQUIS BACQUEHEM.

ON APPEAL FROM H.B.M. SUPREME COURT FOR EGYPT.

(In Prize.)

Prize Court—Enemy Ship—Ignorance of Hostilities—Boarding at Sea—Permission to continue Voyage—Entry into Belligerent Port—Detention—Capture—Convention VI. of the Hague Convention of 1907, *arts.* 1 *and* 2.

A merchant vessel belonging to a belligerent Power which enters an enemy port with knowledge that hostilities have broken out is subject to condemnation, although she has derived that knowledge from an enemy warship which has allowed her to proceed on her voyage.

An Austrian vessel which, after being stopped at sea by a British warship and told of the outbreak of hostilities, was allowed to continue her voyage, entered the port of Suez, apparently in the belief that it would be treated as a neutral port. She was prevented from entering the Canal and was detained. Subsequently she was taken out to sea and conducted to a British warship which seized her as prize:—

Held, reversing the judgment of H.B.M. Supreme Court for Egypt, which had made an order for detention during the war and restoration to the owners at its conclusion, that the vessel must be condemned.

Appeal from H.B.M. Supreme Court for Egypt.

On August 17, 1914, the steamship *Marquis Bacquehem*, of 4412 tons gross register, belonging to the Austrian-Lloyd Line, in the

* *Present:* Lord Parker of Waddington, Lord Sumner, Lord Parmoor, Lord Wrenbury, and Sir Samuel Evans.

course of a voyage from Karachi to Trieste was stopped in the Red Sea by H.M.S. *Duke of Edinburgh* and informed of the outbreak of war between Great Britain and Austria, but was allowed to continue her voyage. On August 20 she entered the port of Suez, apparently in the belief that it would be treated as a neutral port. The captain of the port, acting under general orders to prevent enemy ships entering the Canal, removed certain parts of the machinery so as to disable her from proceeding. She continued to lie in Suez Roads until October 27, when she was taken out by the Egyptian authorities and handed over to H.M.S. *Mosquito*, which seized her as prize.

The Egyptian Prize Court held that the vessel had been seized under circumstances which entitled her to be detained during the war and restored to her owners at its conclusion.

The Procurator-General, on behalf of the Crown, appealed.

The arguments sufficiently appear from the judgment.

1916. March 16. *Sir Frederick Smith, A.-G.*, and *John B. Aspinall*, for the appellant.

Sir Robert Finlay, K.C., and *Balloch*, for the respondents.

April 13. The judgment of their Lordships was delivered by

Sir Samuel Evans. The subject-matter of this appeal is an Austro-Hungarian steamship of about 4400 tons gross register.

The Court at Alexandria pronounced that the ship had been seized under such circumstances as to be entitled to detention in lieu of confiscation, and ordered that she should be detained until further order. The Court further declared that the ship should be restored or her value paid to the owners at the conclusion of the war, in accordance with the provisions of the Hague Convention No. VI. of 1907.

The appellant contends that this order should be set aside, and asks for the condemnation and confiscation of the ship as prize.

The respondents seek to uphold the order. They have not brought a cross-appeal and do not ask for restitution.

The facts alleged and relied upon by the respondents in support of the order were that on August 17, 1914, when the ship was in the Red Sea about 150 miles north of Port Sudan on her voyage from Karachi to Trieste, she was boarded by officers from H.M.S. *Duke of*

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Edinburgh and informed of the outbreak of hostilities between Great Britain and Austria-Hungary; that until then those on board of her were ignorant of such hostilities; that an officer from H.M.S. *Duke of Edinburgh* informed her master that he was at liberty to proceed on the voyage, and made an entry to that effect in the ship's log-book; that she so proceeded and entered the port of Suez; and that she intended to prosecute the voyage through the Suez Canal to its termination at Trieste, but was prevented from so doing by the disabling of her engines on August 20.

As was done in reference to Port Said, and the captures of vessels which had been lying there, in the cases of *The Gutenfels* (1) and others, their Lordships in the present case accept that the port of Suez, in the circumstances of the time, is to be regarded as an "enemy port" within the meaning of the Hague Convention.

Assuming this in favour of the respondents, and assuming, for the purposes of this appeal, that the Hague Convention is binding upon Great Britain and Austria-Hungary, their Lordships consider it clear that the case of this ship is not one of those specified in the Convention, where only an order for detention during the war, on condition of restoration or of making compensation after the war, should be made.

Upon the undisputed facts the vessel was not in a belligerent or enemy port at the outbreak of war; nor did she enter such a port while ignorant of the hostilities between the two countries; nor was she captured on the high seas while ignorant of such hostilities.

Accordingly, in their Lordships' opinion, the order made in the Court below in the terms of the Hague Convention cannot stand.

But even if the ship was not entitled to direct protection under the provisions of the Hague Convention, counsel for her owners contended that, inasmuch as the only knowledge of hostilities which her master had was derived from H.M.S. *Duke of Edinburgh*, and as she had been allowed to proceed on her voyage by the visiting officer from the *Duke of Edinburgh*, she ought not to be deprived of the protection she had claimed under the Hague Convention or to be in a worse position than she would have been in if the *Duke of Edinburgh* had captured her at sea and exercised the right to detain her.

(1) Ante, p. 112.

These contentions were not formulated in accordance with any principle of law, and their Lordships are unable to accept them, even if the facts were as alleged.

In order to appreciate the real situation relating to the voyage, visit, search, and seizure of the vessel, it is deemed useful to make a short statement of the facts as they present themselves to their Lordships.

The ship was loaded at Karachi, bound with a cargo of cotton for Trieste, and with a cargo of 4600 sacks of grain for Aden. She set out on her voyage from Karachi on August 4, 1914. The following entry appears in the ship's log :—

" August 4, 1914.—Left Karachi. A few minutes before the steamer left the port the agent of the Society repeated a telegram to the commander of the ship received from the directors of the Austrian-Lloyd ordering the captain to go direct to Trieste—not to stop at Aden—and on arrival at Suez the passengers would be shipped on to another steamer and taken to their destination."

The vessel was not constructed for passenger traffic. No information was given as to what passengers were on board or what were their respective destinations. Nor was anything said about any steamer on which they were to be shipped at Suez. But an entry in the log on August 26 refers to " arrangements for fifteen Austrian reservists to go to Alexandria en route for Europe."

The summary of the contents of the log between Karachi and Suez (from August 4 to 20) is unusually meagre. It only records the visit from H.M.S. *Duke of Edinburgh* on the 17th. But on a loose sheet of paper discovered in the log-book by his Honour Judge Cator were found these entries :—

" August 12-13, 1914.—We navigate at the same speed. At 8.30 Ras Marshay was sighted. As by approaching Aden we might meet the ' natanti,' and in order not to be seen we navigate without lights, this all the more as we had seen some searchlights from the direction of the harbour.

" August 13.—At night we navigate without lights towards the Straits of Perim, keeping our steamer out of the way in order to avoid encounters."

Thus, darkly and furtively, did the ship sail past Aden—a British possession—the port to which a large part of her cargo was destined.

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There is a significant omission of any reference to the Aden cargo in the master's affidavit and in the petition filed for the claimants.

The ship was navigated with similar precautions through the straits and past Perim Island, also a British possession.

When, on August 17, after travelling some 700 miles or more up the Red Sea, she was visited and searched by the officer from H.M.S. *Duke of Edinburgh*, these incidents of the voyage and entries on the loose sheet were not disclosed to him. The Lieutenant Commander acted (no doubt upon the information imparted, to which he appears to have given the unsuspecting credence of an honest sailor) upon the assumption that the master of the enemy vessel was not aware of hostilities. He also acted under a misapprehension that some period of grace had been allowed to the ship. He accordingly refrained from capturing her, and made the following entry in the ship's log-book :—

" Boarded steamship *Marquis Bacquehem* in latitude 22° 25′ N., longitude 37° 8′ E., and informed captain that a state of war exists between England and Austria. Being within the period of grace, allowed ship to proceed on her voyage. (Signed) J. K. B. Birch, Lieutenant Commander, R.N., H.M.S. *Duke of Edinburgh*, commanded by Captain H. Blackett, R.N."

It was argued, or suggested, that this constituted some kind of licence for the ship to proceed upon her voyage without any risk of capture, or, at any rate, of any capture or seizure involving more than detention as a penal consequence. But the entry, in fact, was nothing more than a memorandum of his visit and search which the boarding officer was bound, as part of his duty, to record on the ship's log.

The instructions to officers in such a case are prescribed thus :—

" The visiting officer should enter on the log-book of the vessel a memorandum of the search. The memorandum should specify the date and place of the search, and the name of Her Majesty's ship and of the commander ; and the visiting officer should sign the memorandum, adding his rank in the Navy." (See Holland s Manual of Naval Prize Law, issued by authority of the Admiralty, 1888, art. 225.)

What the officer did amounted to no more than if he had said " From what you have told me, so far as I am concerned you can go."

Having thus escaped capture by H.M.S. *Duke of Edinburgh*, the ship reached Suez on August 20.

There her engines were partly disabled so as to prevent her from entering the Canal; and there she remained until she was taken out to the Roads and captured on October 27.

It was admitted by respondents' counsel that, notwithstanding anything contained in any of the Suez Canal Conventions, it was right for the safety of the Canal to disable the ship so as to make it impossible for her to enter it.

In these circumstances, their Lordships are of opinion that the owners of the ship could not after that claim any rights or privileges under any of the Canal Conventions.

In the course of his argument counsel for the respondents did not rely upon any protection or privilege under the Canal Conventions. After the reply of the Attorney-General, however, in answer to their Lordships, he put forward tentatively an argument that under the Conventions the vessel while at Suez was immune from any act of hostility. As to this, it is sufficient to state, in addition to what has already been said, that their Lordships find, as a fact, that the ship did not intend to pass through the Canal in the course of her voyage. She intended to, and did, use Suez as a port of refuge. She made direct for it, although laden with a cargo destined for Aden which would have to be reshipped and carried back about 1300 miles to be delivered at Aden. At Suez her "passengers" were to be shipped on to another steamer and thence "taken to their destination." She regarded Suez as a neutral port, and intended to stay there indefinitely; and, indeed, on October 26 a protest was made against her expulsion from the neutral port.

His Honour Judge Cator, in the Court below, said he greatly doubted if the ship ever intended to proceed beyond Suez. Their Lordships do not share any such doubt. On the contrary, they have come to the conclusions above stated.

As to the order made in the Court below, the judgments express in terms the difficulties the Court felt in ordering detention instead of confiscation.

Judge Cator in one passage said: "If the news of hostilities had reached her through any source but that of a British man-of-war, I apprehend that we should have no option but to condemn her to

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confiscation. That would have been her fate under the old law, and she can only escape by bringing her case within the exceptions specified in the Hague Convention, and when the language of the Convention is clear we must abide by it. For although I have every wish to construe its articles in a liberal spirit, the Court cannot modify or add to them."

Their Lordships have already declared their opinion that the ship could not be brought within the provisions of the Sixth Hague Convention at all.

In another passage his Honour expressed himself as follows: "I find it hard to decide whether we should confiscate the ship or only order her detention. I have had more difficulty in making up my mind upon this point than any that I have yet had to determine in prize. For although it is true that, after being warned, the *Marquis Bacquehem* might have run for a neutral port, it certainly does seem hard that she should be in a worse plight because the *Duke of Edinburgh* allowed her to proceed instead of taking her before a Prize Court, especially as this permission seems to have been given in the belief that the ship was entitled to consideration in consequence of her ignorance that war had broken out. Moreover, no stipulation was made that she should go to a neutral port, and she may have been encouraged in the belief that she could enter Suez in security. On the whole, I think that we should only order detention."

Their Lordships have already shown that this view of the effect of what was done by the Lieutenant Commander of the *Duke of Edinburgh* was erroneous, and that no such result could properly be held to follow his visit and search and his record thereof in the ship's log.

Indeed, if the officer had been truthfully informed of the facts, he would have been justified himself in capturing the ship on the high seas; and if that had been done, the facts would supply sufficient evidence to enable the Court to order her confiscation.

It is not necessary to comment further upon the judgments. Their Lordships have only dealt as fully as they have with the case because they differ in opinion from the learned judges of the Court below. Upon the simple ground that the ship, after knowledge of hostilities, entered into an enemy port, where in the circumstances

she was not entitled to protection or immunity under any international Convention, their Lordships are of opinion that she was properly seized as prize and is subject to confiscation.

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Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed, that the order appealed against should be reversed, and that an order be made condemning the vessel as lawful prize to the Crown. The respondents must pay the costs of the appeal.

Solicitor for appellant: *The Treasury Solicitor.*
Solicitors for respondents: *Waltons & Co.*

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[PRIVY COUNCIL.]

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ON APPEAL FROM H.B.M. SUPREME COURT FOR EGYPT.

(IN PRIZE.)

Prize Court—Enemy Ship—Use of Suez Canal Port as Port of Refuge—Rejection of Safe Conduct Pass—Seizure—Suez Canal Convention, 1888, arts. 1 and 4.

The Suez Canal Convention, 1888, which provides that the Canal shall remain open in time of war as a free passage even to belligerent ships, and that no act of hostility shall be committed in the Canal or its ports of access or within three miles thereof, has no application to enemy ships which are using one of its ports of access, not for the purpose of passage through the Canal, but as a port of refuge in which to seclude themselves in order to defeat belligerents' rights of capture.

APPEALS by the owners of three German merchant vessels from decisions of H.B.M. Supreme Court for Egypt condemning the vessels as lawful prize.

The facts and arguments appear from the judgment.

1916. March 16, 17. *Sir Robert Finlay, K.C.*, and *C. R. Dunlop*, for the appellants the owners of the *Pindos*.

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR SAMUEL EVANS.

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Sir Robert Finlay, K.C., and *Dumas*, for the appellants the owners of the *Helgoland*.

Sir Robert Finlay, K.C., and *Balloch*, for the appellants the owners of the *Rostock*.

Sir Frederick Smith, A.-G., and *Ricketts*, for the respondent in the case of *The Pindos*.

Sir Frederick Smith, A.-G., and *Hubert Hull*, for the respondent in the cases of *The Helgoland* and *The Rostock*.

April 13. The judgment of their Lordships was delivered by

LORD SUMNER. These are three appeals from three decrees of His Majesty's Court of Prize in Egypt condemning these vessels as lawful prize. In view of the fact that reliance was placed on immunities alleged to be claimable under international conventions, no objection has been raised, such as was raised in *The Möwe* (1), to the presence of enemy owners to be heard before their Lordships on appeal.

The steamship *Pindos* is a steamship of 2933 tons gross, which belonged to the Deutsche Levante Linie, of Hamburg. In the course of a round voyage from Antwerp to Eastern Mediterranean ports she entered Port Said at 2 A.M. on August 1, 1914. Her next port would have been on the Syrian coast. Through her agents at Port Said she "received orders not to proceed until further instructions." She discharged her Port Said cargo and continued to lie in her berth. On August 14 the captain was informed by the authorities that he was free to sail and would receive a pass, if he would call for it at the port office. This he did not do, having been informed by some one, but inaccurately, that the harbour of Port Said had been declared neutral. In fact, by that date Egypt was in a state of hostility de facto to the German Empire. On August 22 a pass for Beirut was actually delivered to him. He says that he doubted its validity, —which, in truth, he had no grounds for doing—but, since he was advised by his agents to stay in Port Said as it was a neutral port, his reasons for staying there are clear.

On October 15 he was taken outside the limits of Port Said and of territorial waters in charge of persons appointed for the purpose by the Egyptian authorities, and then was captured by H.M.S. *Warrior*

(1) [1915] P. 1.

in altitude 31° 24¼′ north and longitude 32° 20¾′ east. Upon these facts a decree of condemnation as prize was pronounced in His Majesty's Supreme Court for Egypt in Prize on February 17, 1915, from which this appeal is brought.

The steamship *Helgoland* is a steamship of 5666 tons gross, which belonged to the Norddeutscher Lloyd, of Bremen. On July 29, 1914, she entered the Suez Canal bound with general cargo from Singapore to Rotterdam and Bremen, and reached Port Said on July 30. Her captain had made preparations to continue his voyage and leave Port Said on July 31, but on his arrival he received instructions from his owners to stay there. He recorded in his log on that day "German mobilization," and on August 17 and 18 he paid off a large number of his crew. A pass was offered to him in the same way as to the captain of the *Pindos*, but he did not avail himself of the offer. Another was actually delivered, also as in that case, of which, though it was valid, no use was made. The reason for this again was that the captain, on the same pretext, had definitely decided, in accordance with his owners' instructions, to stay where he was. Subsequently the *Helgoland* also was taken outside Egyptian territorial waters by persons employed by the Egyptian authorities, and there captured by H.M.S. *Warrior* on October 15 at about the same place. She was duly condemned as prize on February 17, 1915.

The *Rostock* was a steamship of 4957 tons gross, which belonged to the Deutsche-Australische Dampfschiffsgesellschaft, of Hamburg. She came through the Suez Canal from Eastern ports with general cargo, bound, no doubt, for a home port, and arrived at Port Said on July 31 and began to discharge such part of her cargo as was deliverable there. While doing so her captain received a cablegram from his owners at Hamburg to wait further orders. His log records on August 1: "In order to protect ship and cargo from the attacks of the enemy, shall remain until further notice in Port Said, as the harbour is neutral." On August 17 to 19 the ship discharged her cargo of frozen meat. After July 31 the captain received no further communication from his owners. He was treated by the Egyptian authorities in respect of the offer of a pass, the actual delivery of a valid pass subsequently, and the removal of his ship outside Egyptian territorial waters, exactly as the captains of the *Pindos* and the *Helgoland* were treated. He behaved in the same way and for

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the same reasons. The *Rostock* was captured by the *Warrior* on October 15, and was condemned as prize on February 17, 1915.

The claimants in their petitions formally relied on what in each case were substantially the same defences, namely: (1.) the benefit of the Sixth Hague Convention of 1907, arts. 1 and 2; (2.) the benefit of art. 4 of the Suez Canal Convention of 1888 (1), confirmed by art. 6 of the Anglo-French Agreement of 1904; (3.) the formal invalidity and the practical inefficiency of the passes which were offered by the Egyptian authorities; (4.) considerations of equity and natural justice arising out of the circumstances under which the ships were ejected from Egyptian waters.

Of these points the first has already been dealt with sufficiently by their Lordships in the case of *The Gutenfels* (2), and the third in that of *The Achaia*. (3) Of the second all that need be said is this: Whatever questions can be raised as to the parties to and between whom the Suez Canal Convention, 1888, is applicable and as to the interpretation of its articles, one thing is plain, that the Convention is not applicable to ships which are using Port Said, not for the purpose of passage through the Suez Canal or as one of its ports of access, but as a neutral port in which to seclude themselves for an indefinite time, in order to defeat belligerents' rights of capture, after abandoning any intention there may ever have been to use the port as a port of access in connection with transit through the Canal. Those responsible for the ships took their course deliberately, and took it before August 14. The captains appear, as was only natural, to have consulted together and to have acted in concert. In the case of the *Helgoland*, her owners in Bremen, doubtless well-informed persons, as early as July 30, 1914, if not earlier, were so assured, though no ultimatum had then been issued, that Germany would shortly be at war, and England and Egypt would be neutral,

(1) Art. 4: "The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of article 1 of the present Treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of three marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers."

(2) Ante, p. 112.

(3) See note on p. 198, post.

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that they ordered her captain to stop in Port Said instead of trying to reach a Turkish, a Greek, an Italian, or an Austrian port. It is no light responsibility to stop a ship of over 5000 tons with general cargo in mid-voyage for an indefinite period, and thus to imperil insurances alike on ship and cargo, and to incur heavy expenses and probably heavy claims from cargo owners as well; but this responsibility was taken. Their Lordships are of opinion that the evidence amply justified the decision of the Prize Court in each case, that the ships were using Port Said simply as a port of refuge, and therefore without any right or privilege arising out of the Suez Canal Convention, 1888. Hence their expulsion by the Egyptian authorities, when it had become plain that they would not leave of themselves, affords no answer to the claim for condemnation in natural justice, or equity, or law. In view of their common election to remain, no distinction can be drawn between the ships which had used the Canal and the *Pindos*, which never meant to use it at all. By August 14 liability to capture and condemnation had accrued in each case, and no circumstance then existing or arising thereafter annulled that liability. The general question of costs has been dealt with in the case of *The Zamora*. (1)

Their Lordships will humbly advise His Majesty that in each of these three cases the appeal should be dismissed with costs.

The orders should in each case be varied, however, so as to run, "and as such or otherwise subject and liable to confiscation and condemned the said ship as good and lawful prize seized on behalf of the Crown," and in other respects should be in the form of the orders under appeal. (2)

Solicitors for appellants: *Pritchard & Sons; Clarkson & Co.; Waltons & Co.*

Solicitor for respondent: *Treasury Solicitor.*

(1) Ante, p. 77.

(2) The orders appealed against were in the following terms: "This Court . . . . pronounced the said ship [*P.*, *H.*, or *R.*] to have belonged at the time of capture and seizure thereof to enemies of the Crown, and as such, or otherwise, subject and liable to confiscation, and condemned the said ship as good and lawful prize and as seized in the port of Port Said by officials of the Egyptian Government on behalf of the Crown . . . . &c."

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THE ACHAIA.

Sir Robert Finlay, K.C., and *C. R. Dunlop*, for the appellants.
Ernest Pollock, K.C., and *Rayner Goddard*, for the respondent.

1916. April 7. LORD PARKER OF WADDINGTON. The *Achaia* was a German steamship of 2732 tons, belonging to the Deutsche Levante Linie, of Hamburg, She arrived at the port of Alexandria on July 31, 1914, in the course of a voyage from Bremen to Alexandria, and thence to certain Syrian ports. She carried a general cargo, part of which was consigned to Alexandria. She had discharged this part of her cargo by 4 P.M. on August 4. Upon the outbreak of war between Germany and this country she was, under the Egyptian Decision of August 5, allowed till sunset on August 14 to leave the port of Alexandria. On August 12 she was offered a pass for the Piræus available till sunset on August 14, signed by Lieutenant Grogan Bey, Inspector of Marine of the Egyptian Ports and Lights Administration. According to the evidence of Max Stross, the ship's agent, she made all arrangements to leave, but at the last moment came to the conclusion that it would be too dangerous unless the pass were viséd by the French Consul. Moreover, she believed that all Egyptian ports were neutral. She accordingly elected to remain where she was. The port authorities thereupon seized the ship and disabled her engines. Subsequently, on October 19, 1914, the captain and crew were made prisoners of war, and the ship placed in the custody of the marshal of the Prize Court. There can be no doubt that what happened amounted to a seizure as prize.

Their Lordships have already decided in the case of *The Gutenfels* (1) that Egyptian ports must be treated as enemy ports within the meaning of the Sixth Hague Convention. Under the circumstances, however, they are of opinion that the recommendation contained in art. 1 of that Convention was fully complied with. The vessel was given sufficient time to leave the port of Alexandria. She was offered a pass to a neutral port, and there is no reason to suppose that such pass was insufficient, or would not have been recognized as valid by any belligerent Power. The fact that the vessel did not leave Alexandria under this pass was not due to force majeure, but to her own deliberate election not to do so. She cannot, therefore, rely on the provisions of art. 2 of the Convention. Even if Alexandria could be regarded as a neutral port, the fact would be immaterial. The seizure of an enemy vessel in a neutral port, though a breach of neutrality, would not in a Court of Prize afford any ground for its release.

The case is, in their Lordships' opinion, a clear one. The appeal should be dismissed, and the appellants will pay the costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Pritchard & Sons.*
Solicitor for respondent : *Treasury Solicitor.*

(1) Ante, p. 112.

E. C. T.

[PRIVY COUNCIL.]

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ON APPEAL FROM H.B.M. SUPREME COURT FOR EGYPT.

(In Prize.)

Prize Court—Enemy Merchant Ship—Offer of Pass to Neutral Port—Conditions—Failure to use Pass—Seizure—"Force majeure"—Insufficient Funds—Hague Convention No. VI. of 1907, *arts.* 1 *and* 2.

An enemy merchant ship is not entitled to receive an unconditional pass under art. 1 of the Hague Convention No. VI. of 1907, and conditions attached to the offer of a pass which are manifestly reasonable do not invalidate it.

The expression "force majeure" in art. 2 has reference to circumstances which render the ship unable to leave the port within the days of grace allowed her, and does not include the circumstance that the owners have not provided the master with sufficient funds to continue the voyage.

Appeal by the owners of the Austrian steamship *Concadoro* from a judgment of H.B.M. Supreme Court for Egypt condemning the vessel as prize.

The facts and arguments are fully stated in their Lordships' judgment.

1916. March 17. *Sir Robert Finlay, K.C.*, and *Theobald Mathew*, for the appellants.

Sir Frederick Smith, A.-G., and *Branson*, for the respondent, the Procurator-General.

April 14. The judgment of their Lordships was delivered by

Lord Parmoor. The steamship *Concadoro* is an Austrian vessel (1813 tons gross and 1198 tons net register) registered at Trieste. On August 1, 1914, the *Concadoro* left the port of Cardiff under charter to Messrs. D. L. Flack & Son with a cargo of patent fuel destined for consignees at Port Soudan. She arrived at Port Said

* *Present:* Lord Parker of Waddington, Lord Sumner, Lord Parmoor, Lord Wrenbury, and Sir Samuel Evans.

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on August 18, 1914, her master being ignorant that war had broken out between Great Britain and Austria-Hungary. Owing to the outbreak of war, the master was not provided by the managing owner with funds to enable him to continue his voyage, and decided to remain at Port Said, fearing to put to sea lest he should be captured by British men-of-war. The master says that he believed Port Said to be a neutral port. Their Lordships have already found that Port Said was not at this date in fact a neutral port, and that, under the Suez Convention, the ships of belligerents had no right to make it a port of refuge. It is only because Port Said has at the said date to be regarded as an enemy and not a neutral port that the appellants are able to found their case on the application of arts. 1 and 2 of the Hague Convention No. VI. of 1907, assuming for the purposes of the appeal that the Hague Convention applies, as their Lordships have done in other appeals from the Egyptian Court.

Immediately on arrival the *Concadoro* came under the general precautionary order issued by the General Officer Commanding British troops that no enemy vessel was to enter the Canal. The *Concadoro* was free to return to the Mediterranean. On September 22, 1914, the master of the *Concadoro* was offered a safe-conduct to Port Soudan, and thence to Basra, on the terms comprised in the following :—

" Sir,—I am instructed to inform you as follows :—

" The coal cargo of the *Concadoro* being required at Port Soudan, you are requested to proceed to that port and discharge it to the consignees' order.

" If you will agree to do so, the Egyptian Government is authorized by the British Foreign Office to grant you a safe-conduct to the said port, and from thence to the port of Basra, a neutral port, on the following conditions :—

" 1. The *Concadoro* must leave Port Said on or before September 27, and must proceed direct to Port Soudan, arriving there not later than six days from date of departure from Port Said.

" 2. She must discharge without delay the 1900 tons of patent fuel to the consignees, Messrs. Contomichalos, Darke, & Co., and forty-eight hours after completion must leave Port Soudan for the neutral port named above.

"3. The *Concadoro* will be liable to capture in the event of any infringement of the foregoing conditions.

"You are requested to give me a written answer to this letter as soon as possible, and, in the event of your acceptance of the conditions named, you will be good enough to apply to this office for the safe-conduct referred to, at the same time informing me of the date and time you propose to enter the Canal.

"(Signed) C. E. D. Trelawney (Captain of Port)."

On September 23 the master replied: "I beg to thank you for your letter of the 22nd, but in reply I regret to inform you that, on account of the present political situation, I cannot see my way to undertake the voyage to Port Soudan before the end of hostilities. I can only deliver the cargo here against original bill of lading and signature of bond with deposit for general average."

Their Lordships would not desire to place undue weight on this letter, but the claim of the master not to prosecute the voyage to Port Soudan before the end of hostilities in substance amounts to a claim to use Port Said as a port of refuge. It is material that at this date the master of the *Concadoro* had received an offer by the consignees of the cargo to advance the sum of 530*l.* for the Canal dues and disbursements at Port Said. On October 22 the *Concadoro* was taken out to sea, under instruction from the Director-General to the Port and Lights Administration of Egypt, and steered northwards towards a British destroyer which was lying outside the harbour. The vessel was boarded by officers and crew of the destroyer, brought back to the point from which she had started in the morning, and was then taken over by a crew from H.M.S. *Warrior*. The next day the *Concadoro*, in charge of a crew from the *Warrior*, left Port Said for Port Soudan. The cargo was discharged at Port Soudan and the *Concadoro* was taken to Alexandria, where she arrived on November 17. The *Concadoro* was subsequently condemned as an enemy ship properly seized as prize, and this appeal is against the order for condemnation.

On the hearing of the appeal two arguments were urged on behalf of the *Concadoro* as differentiating her case from that of the other appeals from His Britannic Majesty's Supreme Court of Egypt in Prize which had come before their Lordships. In the first place, it was argued that the words in art. 1, "il est désirable qu'il lui soit

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permis de sortir librement, immédiatement ou après un délai de faveur suffisant, et de gagner directement, après avoir été muni d'un laissez-passer, son port de destination ou tel autre port qui lui sera désigné," entitled the master to receive a pass, and more than that, a wholly unconditional pass, direct to the port of destination or any other port indicated, and that by reason of the conditions attached to the offer made on September 22, 1914, the safe-conduct was not a proper pass within the meaning of art. 1. Their Lordships agree with the view of Grain J. that the conditions attached under the circumstances were manifestly reasonable. The conditions were that the master of the *Concadoro* should discharge his cargo at the port to which it was consigned, arriving there after the allowance of a sufficient time for the voyage from Port Said ; that she must discharge her cargo without delay, and that forty-eight hours after completion she must leave Port Soudan for Basra, a neutral port, to which the master had originally intended to proceed after discharging the cargo at Port Soudan. Their Lordships hold that manifestly reasonable conditions do not invalidate a pass offered under art. 1. To adopt so narrow a construction of the article would, in their opinion, unduly restrict the benefits intended to be conferred for the protection of mercantile international operations undertaken in good faith, and in process of being carried out before the outbreak of hostilities.

In the second place, it was argued that the inability of the master to procure the necessary funds for his voyage brought the *Concadoro* under art. 2, and that she was unable to leave the enemy port within the days of grace " par suite de circonstances de force majeure." In their Lordships' opinion, this contention cannot be maintained. The " force majeure " contemplated in the article is one which renders the vessel unable to leave the port, and cannot be construed to include the circumstance that the master has not been provided by the owners with sufficient financial resources to continue his voyage. Moreover, in the present case, the master of the *Concadoro* was offered a loan of 530*l.*, which was a sufficient sum, to enable him to pay the charges at Port Said and of the Suez Canal and to take his vessel to Port Soudan.

Their Lordships are of opinion that the order appealed against was properly made, and will humbly advise His Majesty that the

appeal be dismissed with costs. The order should be varied, however, so as to run "and as such or otherwise subject and liable to confiscation and condemned the said ship as good and lawful prize seized on behalf of the Crown," and in other respects should be in the form under appeal. (1)

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Solicitors for appellants: *Charles Russell & Co.*
Solicitor for respondent: *Treasury Solicitor.*

E. C. T.

[PRIVY COUNCIL.]

THE BOLIVAR.

ON APPEAL FROM THE HIGH COURT OF JUSTICE. PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(In Prize.)

J. C.* 1916 *May* 17.

Prize Court—Practice—Decree condemning Cargo—Default of Appearance—Rehearing—Jurisdiction.

Where substantial injustice would otherwise result, the Prize Court has an inherent power to set aside its own decrees of condemnation so as to let in bona fide claims by parties who have not been heard, and who have not had an opportunity of appearing. This power is discretionary and should not be exercised except where there would be substantial injustice if the decree were allowed to stand, and where the application has been promptly made.

Appeal by special leave from an order of the Admiralty Division (in Prize).

The appellants, Juan E. Paris & Co., were neutrals carrying on business in Venezuela. In February, 1914, they chartered the

* *Present:* Lord Parker of Waddington, Lord Sumner, Lord Parmoor, and Sir Arthur Channell.

(1) The order appealed against was in the following terms: "This Court . . . . pronounced the said ship *Concadoro* to have belonged at the time of capture and seizure thereof to enemies of the Crown, and as such, or otherwise, subject and liable to confiscation, and condemned the said ship as good and lawful prize and as seized in the port of Port Said by officials of the Egyptian Government on behalf of the Crown, &c."

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German schooner *Bolivar* to proceed to Maracaibo, a port in Venezuela, and there load a cargo for delivery at Hamburg. In June, 1914, they shipped at Maracaibo a cargo which, by bills of lading, was to be delivered at Hamburg " for and in the name of " the appellants to one Weil or to his order.

The *Bolivar* sailed from Maracaibo on June 23, 1914, and during the voyage, after the outbreak of war, was captured by a British cruiser. On August 31, 1914, a writ was issued by the Procurator-General claiming condemnation of the ship and cargo, but no appearance was entered. On October 1, 1914, the President, upon evidence that the ship was German and upon the master's copies of the charterparty and bills of lading, condemned the ship and cargo ; under the terms of the decree the ship and cargo were sold and the proceeds paid into Court.

The appellants by a letter dated October 19, 1914, and received in London on November 21, 1914, asked their London agents to take steps to obtain the release of the cargo, which they claimed as their property. In December solicitors on behalf of the appellants' agents wrote to the Procurator-General enclosing documents received from the appellants and claimed the goods. The Procurator-General replied stating that the cargo had been condemned and sold, and by a subsequent letter stated that he had handed the documents to the secretary of the Prize Claims Committee. On January 16, 1915, the solicitors wrote to the secretary of that committee asking whether any decision had been arrived at, and the secretary replied that he would lay the claim before the committee as soon as possible. On April 15, having received no further information, the solicitors asked for and obtained the return of the documents.

On May 7, 1915, a summons was issued in the Prize Court proceedings for an order that the appellants' agents in London might be at liberty to enter an appearance and to put in a claim in respect of the proceeds of the cargo. No affidavit was filed in support of the application.

The President, on the ground of delay and of acquiescence in the claim being considered by the Prize Claims Committee, refused the application and declined to give leave to appeal. Special leave to appeal was granted.

1916. May 17. *Sir R. Finlay, K.C.*, and *C. R. Dunlop*, for the appellants. The Prize Court has jurisdiction to review its decree and to order a rehearing: *The Orcoma* (1), citing *The Vrouw Hermina*. (2) The appellants were in Venezuela and had no opportunity of appearing. Under the circumstances of the case there was no undue delay. [Order II., rr. 10 and 11, of the Prize Court Rules were referred to.]

The Solicitor-General (*Sir George Cave, K.C.*) and *A. B. Marten* (for *G. T. Simonds*, serving with His Majesty's Forces), for the Procurator-General. The decree is a judgment in rem and there is no jurisdiction to order a rehearing. The judgment of a Court after a hearing cannot be reviewed by the Court which pronounced it except under a specific rule of practice: *Hession* v. *Jones*. (3) There is no rule of the Prize Court dealing with the matter, and consequently under Order XLV. of those Rules the former practice of the High Court of Admiralty applies. It was contrary to the practice of that Court to review a decree: *The Elizabeth*. (4) The judgment in *The Vrouw Hermina* (2) shows that if there is any jurisdiction it is one which should be exercised with great caution. [Story on Prize Courts, 1854, p. 222, par. 23, was also referred to.] In any case, the President rightly exercised his discretion in refusing the application having regard to (1.) the delay in applying, (2.) the acquiescence in the claim being dealt with by the Prize Claims Committee, and (3.) the absence of any affidavit.

Sir R. Finlay, K.C., replied.

The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. Where substantial injustice would otherwise result, the Court has, in their Lordships' opinion, an inherent power to set aside its own judgments of condemnation so as to let in bona fide claims by parties who have not in fact been heard, and who have had no opportunity of appearing. This power is discretionary, and should not be exercised except where there would be substantial injustice if the decree in question were allowed to stand, and where the application for relief has been promptly made. In the present case the learned President has refused the relief on the

(1) (1915) 1 Br. & Col. P. C. 402.
(2) (1799) 1 C. Rob. 163.
(3) [1914] 2 K. B. 421.
(4) (1811) 2 Acton, 57.

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ground of delay, apparently under the impression that the appellants invoked the assistance of the Prize Claims Committee, whereas in fact the papers were sent to that committee by the Procurator-General. It was not, under the circumstances, unreasonable for the appellants to have awaited the result of what the Procurator-General was doing before instituting further proceedings in the matter.

Their Lordships therefore think that the proper order would be to allow the appeal and remit the summons to the Court below, with leave to the appellants to amend it in such manner as they may be advised, and file the proper evidence in support thereof.

With regard to the costs of this appeal, their Lordships are of opinion that no costs should be allowed on either side. The costs below will be dealt with by the President on the further hearing of the summons.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Thomas Cooper & Co.*
Solicitor for respondent : *The Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.* 1916 *May* 8.

THE OPHELIA.

ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(IN PRIZE.)

Prize Court—Military Hospital-Ship—User for other Purposes—Wireless Telegraphy Apparatus—Messages in Secret Code—Signalling Lights—Destruction of Ship's Papers—Spoliation of Documents—Hague Conference, 1907, *Convention X., arts.* 1 *and* 8—*Appeal involving Question of Fact only—Practice.*

Art. 8 of Convention X. of the Hague Conference, 1907, provides that the protection to which hospital-ships are entitled under art. 1 ceases if they are used to commit acts harmful to the enemy, but

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* *Present :* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

that the presence of wireless telegraphy apparatus on board is not a sufficient reason for withdrawing protection :—

Held, that, without laying down an absolute rule that the mere sending by a hospital-ship of a wireless message in secret code will of itself forfeit her right to protection and subject her to capture and condemnation, it may certainly be laid down that if such messages are sent a clear and satisfactory record of them must be kept, so that when the right of search is exercised there may be reasonable evidence of the messages and of the necessity—if there can be any such necessity on the part of a hospital-ship—for sending them in a secret code.

An appeal from the Prize Court on facts must be treated as a rehearing in the same way as an appeal to the Court of Appeal from a judge sitting without a jury in the High Court. There is jurisdiction to review the findings of the judge, but the Appeal Court attaches great weight to the fact that the judge below has heard the witnesses and practically acts on the opinion of the judge as to the credibility of the witnesses before him and the weight to be attached to their evidence.

Judgment of the Prize Court [1915] P. 129, condemning a German hospital-ship as lawful prize, in that the evidence showed that she was not used for the sole purpose of affording aid to the wounded, sick, and shipwrecked, but was used as a signalling ship for military purposes, affirmed.

Spoliation of documents and the presumptions arising therefrom considered.

APPEAL from a decision of the Prize Court (England); reported [1915] P. 129.

On October 18, 1914, the German auxiliary military hospital-ship *Ophelia*, 1153 tons gross, was encountered by a British squadron in the North Sea in circumstances which excited suspicion, and was ordered to follow H.M.S. *Meteor* to Yarmouth. The *Ophelia* was then taken to the Thames, where she was formally seized as prize.

On May 21, 1915, the President of the Probate, Divorce, and Admiralty Division (Sir Samuel Evans) delivered judgment condemning the *Ophelia* as lawful prize on the ground that she had forfeited the right to the protection to which a military hospital-ship is entitled under the Hague Convention No. X., as the evidence showed that she was adapted and used as a signalling ship for military purposes.

Naval Staff Surgeon J. V. C. Pfeiffer, commander of the *Ophelia*, on behalf of the Imperial German Government, appealed. The facts are fully stated in the judgment.

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1916. March 2, 3, 6, 7, 8, 9. *Leslie Scott, K.C., Leck, K.C., Darby,* and *V. Holmes,* for the appellant.

Sir Frederick Smith, A.-G., Sir George Cave, S.-G., and *C. R. Dunlop,* for the respondent.

[The arguments sufficiently appear from the judgment. In support of their contention that concealment or spoliation of documents is not in itself sufficient ground for the condemnation of the ship, counsel for the appellant referred to *The Johanna Emilie* (1), *Bernardi* v. *Motteux* (2), *The Pizarro* (3), and Kent's Commentaries, 12th ed., vol. 1, p. 158.]

May 8. The judgment of their Lordships was delivered by

SIR ARTHUR CHANNELL. This is an appeal from a decree of the President of the Admiralty Division, sitting in prize, condemning as lawful prize the German steamship *Ophelia* and rejecting the claim of the appellant, made on behalf of the German Government, to her release as a hospital-ship protected by the provisions of Convention X. of the Hague Conventions of 1907. A very complete abstract of these provisions is set out in the judgment of the learned President, and it is only necessary to refer to the most material of them, which are the following :—

" Art. 1. Military hospital-ships, that is to say, ships constructed or adapted by States wholly and solely with a view to aiding the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers . . . . shall be respected and cannot be captured while hostilities last.

" Art. 8. The protection to which hospital-ships . . . . are entitled ceases if they are used to commit acts harmful to the enemy . . . . the presence of wireless telegraphy apparatus on board is not a sufficient reason for withdrawing protection."

The question whether the *Ophelia* was entitled to protection from capture, as complying with these provisions, or whether, by reason of her equipment or the acts of her captain and crew, she had lost that right to protection, is almost entirely a question of fact. The only question which is at all in the nature of a point of law arises on the words of the Convention as to the presence of a wireless

(1) (1854) 1 Spinks, 317, 325. (2) (1781) 2 Doug. 575, 581.
(3) (1817) 2 Wheat. 227, 241.

telegraphy apparatus, and that question can most conveniently be dealt with after the facts have been stated which raise it. It is necessary, therefore, to consider what is open upon an appeal to this Board from the Prize Court on facts.

The Attorney-General has contended that the findings of the judge below should be held conclusive, and he quotes *The Julia* (1) and *The Princess Alice.* (2) These cases, however, which were collision cases heard on appeal from the Admiralty Court, and not prize cases, only point out the advantage which the judge below had in seeing and hearing the witnesses, and also in the knowledge of navigation which he necessarily acquired in the exercise of his office, and the Judicial Committee merely emphasized the rules on which Appeal Courts always profess to act.

Their Lordships are of opinion that this appeal must be treated as a rehearing, in the same way as an appeal to the Court of Appeal from a judge sitting without a jury in the High Court. There is jurisdiction to review the findings of the judge, but the Appeal Court gives very great weight to the fact that the judge below hears the witnesses, which the Appeal Court does not, and practically acts on the opinion of the judge as to the credibility of the witnesses before him and the weight to be attached to their evidence. Here the evidence for the Crown was all on affidavit, and the evidence for the claimant was given orally, after his witnesses had had an opportunity of studying the evidence for the Crown. The affidavits for the Crown were sworn before the case for the claimant had been disclosed, except so far as it was very slightly disclosed by an affidavit sworn by the claimant on February 13, 1915, which did little more than verify the claim. The claimant did not apply to cross-examine any of the Crown witnesses on their affidavits, and his counsel accounts for this by saying that he does not substantially dispute the facts deposed to by the witnesses, but only the inferences drawn by the witnesses from the facts ; and it is contended that the claimant's evidence explains rather than contradicts the facts on which the Crown relies. To a great extent that is so, but there seem some contradictions of fact, and some points on which the learned President appears not to have accepted as reliable the oral evidence which he heard. On these points their Lordships would not lightly

(1) (1860) 14 Moo. P. C. 210. (2) (1868) L. R. 2 P. C. 245.

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differ from the learned President, but many matters have been raised on the argument of the appeal which cannot be satisfactorily disposed of by treating them as matters of fact concluded by the view of the President. Their Lordships therefore feel it their duty to review the facts in some detail.

No question is raised as to the necessary formalities to constitute the *Ophelia* a hospital-ship having been complied with. She had a proper certificate, and her name had been duly communicated to the belligerent Powers. She was painted properly as a hospital-ship, and was furnished with the proper flags, although a question is raised as to whether she displayed them properly on October 8, one of the days to which the evidence relates.

The first point to be considered seems to be whether the fitting and equipment of the *Ophelia* were such that she can be said, as required by the Convention, to be constructed or adapted "wholly and solely" for affording relief to the wounded, sick, and shipwrecked. The affidavits for the Crown and the admission of witnesses for the claimant show that the vessel, although she had some special fittings appropriate only to a hospital-ship, was not, according to British requirements, at all well adapted and fitted for that purpose; but it is unnecessary to go into the details of this, as their Lordships agree with the view of the learned President (who, it may be observed, himself inspected the ship) that no standard of fitness can be laid down, and although not *well* adapted, this vessel cannot be said *not to be adapted*, and that the real question therefore is whether she was *solely* adapted for hospital purposes. The inadequacy and the, in some respects, curious character of the sanitary and other hospital equipment are not, however, without significance on the question of the use which it was really intended to make of the vessel.

In the opinion of Commander Newman, who had special experience in the fitting of hospital-ships, the *Ophelia* was not only unsuitable for use as a hospital-ship, but was undoubtedly fitted and intended for signalling purposes. He came to that conclusion without knowing that the ship was suspected of acting as a signalling ship, and when he had merely been instructed to report on her suitability as a hospital-ship. It is obvious that there could hardly be a greater or more dangerous abuse of the privileges of a hospital-

ship than the communicating to the naval authorities of her nation information which she would be constantly in a position to obtain by virtue of her immunity. Her signalling apparatus ought to be confined strictly to what would be necessary for receiving instruction as to her duties and for calling for assistance in the performance of them and such like legitimate purposes. That the risk of such abuse was present to the minds of the framers of the Hague Convention is shown by the mention of wireless telegraphy. Instead of the signalling apparatus and equipment of the *Ophelia* being confined within the narrow limits necessary for a bona fide hospital-ship, it was obviously very largely in excess of them. She had a very unusual number of signal halliards working on brackets from the funnel, which brackets were fitted to her in Kiel after her first fit-out and very shortly before her capture ; but it is said by the German witnesses that this was merely in substitution for another arrangement of signal halliards working on a stay between the masts, and that the stay interfered with the wireless apparatus which had been supplied. It appeared, however, that the flags of the International Commercial Code which she had on board were kept stowed away in the chart-house ; whilst on each side of the funnel, which was thus equipped with an abnormal number of signal halliards, there were stowed on hooks, obviously kept there for immediate use, special German flags which must have been provided for her when adapted for a hospital-ship, and must have been meant for secret signalling. Her masts were, on this last visit to Kiel, lengthened, which would have the effect of extending the receiving capacity of her wireless installation. This, it was said, was done not for the purpose of so increasing the range, but because the signal halliards on the brackets were interfered with by the wireless. This explanation in itself shows the great attention which was being paid to the signalling equipment of the ship. It is, however, the enormous number of Verey's signal lights which were on board which seemed to the President, and seems also to the Board, practically conclusive that the vessel was specially equipped for signalling. These lights are fired from a special kind of pistol, of which there were two on board. Of these Verey's lights she had on board no less than 600 green, 480 red, and 140 white lights, obviously a most abnormal number. It is said by Commander Newman that a British vessel of the same class would

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have about twelve of each. At the trial it was discovered for the first time that a record of the number of these lights which had been used had been kept, but that it was destroyed by the paymaster by the order of Captain Pfeiffer after the capture, and on the evening of the day when they had been informed that the vessel was to be put in the Prize Court. The subject of spoliation of documents will be dealt with hereafter, but the destruction of this particular book indicates in a most significant manner that the signal lights were provided for an illegitimate purpose, and none the less so because at that time the British officers had not made any complaint on this point. If any doubt could have remained as to the intended use of these lights, it seems cleared away by the incredible explanation which Captain Pfeiffer was driven to give of the large number of them. He actually swore that the green and red lights were intended to illuminate the surface of the sea and assist in searching at night for shipwrecked mariners or their corpses. Even white lights fired two at a time from the two pistols would be of little use for such a purpose, and green and red lights obviously of no use at all, They were, he suggested, to be so used because curiously enough the vessel had no searchlight, which as an auxiliary hospital-ship she certainly ought to have had. This was the only way in which the number of lights could be accounted for ; but a much better explanation, which would account for a moderate number, was that they were used to acknowledge Morse signals received from a distance greater than the Morse lamp which they had on board would carry, and a suggestion was also made that they would be used to identify the ship on coming into German harbours at night, for which obviously such a number as were on board would not have been wanted. No evidence was given of what the identification signal of the *Ophelia* was, and as to how many, if any, green, red, and white lights would be required to make it.

On these facts the learned President found that the *Ophelia* was not adapted or equipped *solely* as a hospital-ship, and with that finding their Lordships agree. This finding would in itself justify the condemnation, but the matter ought not to be left to rest there, and the use actually made of the vessel must now be considered.

The *Ophelia* was before the war a German merchant-vessel ; a few days before the war she was in the Thames, and on August 3, 1914,

she received orders from the German Consulate by an order of the German Government that she was to return to Germany for military service, and she sailed on August 4 with a party of German reservists on board. She was met by a German gunboat off Norderney and was directed to go to Heligoland, which she did, and shortly afterwards went on to Hamburg, where her fitting as a hospital-ship was commenced by the Hamburg-American Steamship Company for the German Government. On August 12 she went to Kiel, where her fitting was continued. On September 5 she received orders to go to Cuxhaven, and arrived there on the 6th, but shortly afterwards came back to the Kaiser Wilhelm Canal, and got her certificate as a hospital-ship on September 11. On the 19th she went to Heligoland. There she stayed until October 3, when she went to Wilhelmshaven. During all this time she did no hospital work, but, according to the witnesses at the trial, the time was occupied in drilling the crew in boat work and stretcher work and the like. The witnesses denied the suggestion that during that period she did any scouting, and there is no evidence that she did. On October 6 she proceeded from Wilhelmshaven to Schellinghorn Roads, at the mouth of the Weser river, and at 11 A.M. of that day, whilst she was on her passage down the river, a German torpedo-boat, *S.* 116, was sunk by a British submarine in the mouth of the Ems. The *Ophelia* arrived at Schellinghorn Roads about noon, and at 8.30 P.M. received orders to steam at once to the mouth of the Ems. There is considerable mystery as to the orders received on this evening and the next morning. Captain Pfeiffer "thinks" that they were received by Morse code from the Schellinghorn signal station. He also "thinks that it was also said that *S.* 116 had been sunk, but he cannot say for certain, and he thinks that it was even mentioned that there were nine survivors, or something of that kind." He is, however, quite certain that he never was given any statement as to the place where the torpedo-boat was sunk, except that it was at the mouth of the Ems, and equally certain that he never asked any one where the spot was, and did not know it on the 8th. On receipt of the order at 8.30 P.M. on the 6th the *Ophelia* got her anchor and proceeded to sea, having taken a pilot on board, from whom, of course, it is possible that Captain Pfeiffer got some of the information of which he cannot recollect the source. On passing the German warship *Beowulf*,

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which apparently was acting as guardship somewhere to the west of the entrance to the Weser, she received orders to return. This was a verbal order, and the captain's memory is again at fault as to the particulars of it. In the log the entry is "Received counter-orders, steamed back." The captain "thinks" that the reason of this order, either stated or conjectured, was that navigation was dangerous at night, which when lights were extinguished and buoys removed was probably the case; but if there had been a reasonable prospect or real idea of saving life the risk, one would think, would have been run. On the following morning, about 9.30, orders were received again from Schellinghorn signal station to proceed "*to the place* of the accident." These orders are not entered in the log, although both the orders of the previous evening are, and they are stated only on the recollection of the captain. He does not appear surprised at receiving orders to go to a place he did not know, and again he asked no questions.

They weighed anchor at 10 A.M. and got off the Eastern Ems buoy at 5.40 P.M. They apparently anchored outside of Borkum to wait for a pilot, and, having taken one on board at 7.30 P.M., proceeded and came to anchor for the night in the Ems, somewhere off Borkum, at 8.30 P.M. There was some discussion as to the place of anchorage, but it does not seem very material. There was no information obtained from the shore except such as may have been obtained from the local pilot, and Captain Pfeiffer does not say that he asked for any information from him as to the place of the accident, and does not say that the pilot, who either remained on board or came on board again to take them out on the morning of the 8th, knew it.

It seems very odd that no inquiry should be made for the information which would appear so necessary, and which, it is said, was never given, and it is impossible to avoid a suspicion, in the absence of any reliable record of the signals received, that there were some directions given as to what was to be done which were of a nature that it is not desirable to disclose.

At 6.50 on the morning of October 8 the *Ophelia* got her anchor and, to use the words recorded in her log, "steamed under directions of the pilot out of the Ems by land and sea marks on the search for a sunken torpedo-boat." The movements of the *Ophelia* on that

day were the subject of much controversy, both in the Court below and on the argument of the appeal. Indeed, the counsel for the appellant devoted a large part of his argument to the events of that day, and contended strongly that the President was wrong in the view he took of these events, and in his finding as to the speed of the *Ophelia*, which was material in its bearing on the events of October 8, and possibly on the credibility of the German witnesses, who all swore most positively that the *Ophelia* was incapable of going faster than about nine and a half knots.

A British submarine was on that day on patrol duty off the mouth of the Ems, and her commanding officer, Lieutenant-Commander Moncreiffe, makes an affidavit as to what he observed, which he thought so suspicious that he reported it at the first opportunity to his superior officer. This affidavit was sworn before Commander Moncreiffe had any information as to the German version of the events of the day, except by seeing a copy of the *Ophelia's* log. The affidavit of Captain Pfeiffer verifying the claim makes no mention of October 8. Commander Moncreiffe, in reference to the entry in the log quoted above, says that he was quite certain that the *Ophelia* was not searching for a sunken torpedo-boat or any sunken vessel, and that, of course, is absolutely true. It is clear from the German evidence, as well as from Commander Moncreiffe's own observations, that she was not sweeping the bottom to locate the position of the sunken wreck, and the entry in the log is, taking it literally, clearly untrue ; but it would, perhaps, be unfair to take the words so literally and not to assume that the words used refer to a search for floating wreckage, survivors, and corpses from the sunken vessel, rather than to a search for the wreck itself at the bottom of the sea. The result, however, is that Commander Moncreiffe has not dealt with the story now told by the German witnesses on this and on some other points. No notice to cross-examine him on his affidavit having been given, the Crown did not think it necessary to call the witness away from his naval duties, and he was not in attendance at the trial, otherwise he might have cleared up, one way or the other, several of the matters which have been the subject of much argument.

His account of the matter shortly is that about 9.15 English time, by his clock (which he does not vouch as quite accurate), he saw to

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the south-east the smoke of a vessel, which afterwards proved to be the *Ophelia*, coming from the Huibert Gat (the southernmost of the three passages into the Ems between the shoals) and proceeding in a westerly direction. He proceeded in a southerly direction, and at 9.28, when in latitude 53° 45′ N. and longitude 5° 46′ E., he sighted the masts and funnel of the vessel, which had then altered her course "to the northward." Comparing this with the account of the *Ophelia*, she started at 6.50 German time, or 5.50 English time, and went out of the Huibert Gat. On the way out she passed close to the German torpedo-boat No. 119, the commanding officer of which was called as a witness at the trial, he being then a prisoner of war. The *Ophelia* made no inquiry of that torpedo-boat as to the place of the accident, and received no information on the point. At 9.30 German time (8.30 English) she sighted an English submarine to the north or north-west, "about eleven miles off Schiermonnikoog," according to her deck log. The deck log gives no courses, which, however, can be accounted for if she was at first following a channel and afterwards zigzagging on a search; but as the engine-room log records running full speed ahead from 7 to 10 A.M. (6 to 9 English time), she would, if running on anything like a straight course, have been well outside the Huibert Gat, and at least as far to the westward as the place where she is described by Commander Moncreiffe as being at 9.15 and 9.28 English time. She might even have done some zigzagging and still have been as far out as that. The *Ophelia's* engine log records that between 10.10 and 10.28 she twice stopped, went full speed astern, and then ahead again. These would be the manœuvres of a steamer picking up a boat or anything floating, and Captain Pfeiffer at first explained them by saying he picked up a pilot, but afterwards corrected this and said that he did that before coming out of the Ems, so it could not have been after 10 o'clock. Pfeiffer also said that at some time, which, however, he puts as happening on the return journey, while searching on this day they sighted a floating object, which might have been wreckage but turned out to be a fisherman's basket. This cannot be the explanation of the manœuvres between 10 A.M. and half-past. Whatever those manœuvres were, they were not observed by Commander Moncreiffe, the vessel being hull down when they began; but the time when they ended and when the *Ophelia* went full speed ahead again corresponds with the time

(9.28 English, 10.28 German) when Commander Moncreiffe made out the two masts and funnel of the *Ophelia* and saw that she had altered her course " to the northward," which would not of course necessarily mean that she was heading due north. So far there is little, if any, contradiction, and nothing making it clear that the story of the *Ophelia* taking zigzag courses in order to search was untrue. At 9.45 Commander Moncreiffe speaks of another alteration of the *Ophelia's* course, and he then made out she was painted as a hospital-ship. At 10, he says, she evidently made out his presence and " hoisted " her Red Cross flag. Later on he said that she " hauled down " that flag. If that means that the commander actually had his glasses to his eyes and saw the flag actually going up or coming down it is significant, although not quite easy to say why she should do it ; but if it only means that he saw the flag flying and then shortly afterwards failed to see it when he looked for it and thought it was hauled down, it means very little. A steamer's flags in a moderate wind will not fly out when she is going with the wind. It happens that at the time he says the flag was hoisted the *Ophelia* was heading north-west and then north, and on either course, the wind being west-north-west, the flag would fly out well, and when he says it was hauled down she was heading very nearly east down wind, and he was very nearly astern of her and to windward, and would not be very likely to see her flag. It is unfortunate that the commander could not be called to clear up the doubts which arise on his affidavit made under the circumstances it was. The next thing stated by the commander is that after standing to the northward for five minutes from 10 to 10.5 the *Ophelia* altered her course to east, and at 10.18 was steering S. 85° E. true (that is, very nearly E.), and being right ahead of him on the same course he could at this time speak with absolute accuracy as to the course she was steering, whereas before he could only do so approximately.

The log of the *Ophelia* records that at 11 o'clock (10 o'clock English time) she steered back up the Ems. She went up the Western Ems channel, and S. 85° E. true would be a course which would take her up that channel. There is, therefore, a remarkable coincidence here. Although the German log is very meagre and possibly not very reliable, this entry must have been written in without the writer knowing Commander Moncreiffe's story. According

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to the plotting on the chart of the course of the two vessels given to the Board on behalf of the Crown, after correction of an obvious error in the first plotting, the *Ophelia*, when at 10 o'clock English and 11 o'clock German time she turned to the east, was a long way north of the entrance to the Western Ems channel, and after standing in that direction for something like three-quarters of an hour had to come to the southward to make the entrance. This depends on the accuracy of the plotting; and that further depends upon the exact correctness of the courses of the *Ophelia* as estimated from the submarine. It is remarkable that the affidavit, in rather curious language, states that at 10 o'clock the *Ophelia* was "in a position which would be accurately described as near Schiermonnikoog." If she was at the position plotted she would be somewhere about eighteen miles from Schiermonnikoog, which could hardly in any sense be called near; whereas if she was near the Western Ems buoy and about to proceed up the Western Ems channel she would only be about eight miles from Schiermonnikoog; and if, as is more probable, she was to the westward of the position of that buoy, but at a point from which the Borkum Island lighthouse bore anywhere near S. 85° E. (true), she would be a very great deal nearer to Schiermonnikoog than if at the plotted position, and if steering that course from such a point she would get to the entrance to the Western Ems channel and a long way up it without having to alter the course. This rather suggests that the plotting cannot be right. At this point the question of the speed which the *Ophelia* was capable of going becomes material. Commander Moncreiffe says that she was obviously running away from him, and appeared to have increased her speed by two to three knots, and that finding he could not "overtake" her he gave up the chase. He made no signal for her to stop. He was going eleven knots. She was shortly before this four and a half to five miles away from him, and, putting it at only four miles, it would have taken him two hours to catch her if she was only going nine knots (her admitted speed) to his eleven, and by that time, if she was going where she says, both would have been near Borkum or beyond it, and he would have been in a trap, with the difficulty a submarine has in diving in shallow water or among shoals. If, however, both were considerably to the northward, he would have had plenty of sea room, and if going faster than

she was would of course have caught her. It is suggested that in saying he could not "overtake" her he merely meant that she would have got into shelter before he could do so, and that, as to running away, the *Ophelia* was, it is true, going straight away from the submarine, but was on her proper course home. Why, however, she should have started for home when she did with plenty of daylight left, and without having searched all the channels into the Ems, is quite unexplained.

The President expressed the opinion that the *Ophelia* must be able to go more than nine knots, because it appeared by her log of August 5 that she had done so when escaping from England at the outbreak of the war. According to the readings of the patent log, on that day, as entered in the log-book, she undoubtedly in some hours did more; but it has been pointed out on the argument of the appeal that there are obvious inconsistencies in the readings for that day, and that there must be some mistake. On the other hand, the Attorney-General produces the figures from the log of other voyages of the *Ophelia* when she was a German trading vessel, which, if correct, show that she then constantly averaged eleven knots. The account of the German witnesses on this matter is peculiar, as most vessels can at a pinch do more than their usual so-called maximum. On the whole, it certainly seems probable that she can go faster than her witnesses swear to, and the experienced officer who thought she was running away was probably in the right on such a point. Certainly the movements of the *Ophelia* on October 8 are most suspicious. The evidence shows that at that time there was in the Ems the flotilla of German torpedo-boats which a few days afterwards made a dash out of the Ems on some unknown destination and which were then intercepted by a British squadron, pursued in a north-easterly direction, and sunk on October 17 near the spot where the *Ophelia* afterwards appeared again. Probably this flotilla was on October 8 looking out for an opportunity to make this dash, and if the German naval authorities were unscrupulous enough it would have been very useful to them to use the *Ophelia* in order to ascertain whether the British submarines were still off the mouth of the Ems, rather than to have to send out one of the torpedo-boats to scout when she might have met the fate of *S.* 116. It is also possible that the *Ophelia* may have been trying to tempt the submarine into a

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trap. But the question is whether there is proof of this, or merely suspicion. Having regard to the fact that a search by a hospital-ship for corpses of sailors drowned by the sinking of their ship would be a legitimate operation for such a ship, even after a search for survivors had become practically hopeless, and that such a search, if made four tides after the disaster, must be made over rather a wide area and would be made at a fair speed, with men on the look out for floating objects, and having regard to the matters which appear somewhat ambiguous in Commander Moncreiffe's affidavit, their Lordships would probably hesitate to find it proved that the *Ophelia* was scouting on the 8th if there was no other case proved against her; but when subsequent events are considered there is much more to show her to be a scout.

After anchoring on the 8th Captain Pfeiffer landed at Borkum and sent a telegram, a copy of which was not produced, and which, he says, was only to ask for orders. In the course of that night he got, by Morse signal, orders to go to Hamburg to clean boilers. They did go to Hamburg, and remained about five days; the boilers are said to have been cleaned, and the masts were then lengthened, and the signalling equipment altered as already mentioned. There is no entry in the log of the cleaning of the boilers or of the orders to do it, and it looks rather as if the real object of the visit to Hamburg were to have the signalling equipment improved. They left Hamburg on the 15th and, after stopping a night at the mouth of the Elbe, arrived at Heligoland on the 16th. On the evening of the 17th (at 7 P.M.) they are said to have received an order by wireless telegraphy. When the ship was captured on the 18th there was produced what purported to be the original copy of this message as taken down by the operator. That original was produced on the hearing before the President and on the argument of the appeal. The original was on a form which has on it the three words "open," "sealed," "decoded," for the purpose, apparently, of the inappropriate words being struck through. On the copy produced the words "open" and "decoded" are struck through, "sealed" being left, and this was in accordance with the evidence that this message came in the second German code known as "H V B." This code was used by non-combatant Government ships. War-ships had another secret code for use between themselves, but

they also had copies of the " H V B " code in order to communicate with auxiliary ships. Wireless messages to the *Ophelia* were taken down on a pad, and, obviously, when in code they must be taken down as they come and be afterwards translated or decoded. They could not, therefore, be taken down when heard on the form produced. The operator Grau was called as a witness and explained that he did not know the code without the book. There were also on the form printed words with spaces for the time and date to be filled in, and this was done on the message of the 17th. The message of the 17th, which there is no reason to suppose was not genuine, reads " Go at once to the Haaks lightship. Further instructions to follow." At the trial evidence was given both by Pfeiffer and Grau that a book for entering wireless signals in was kept; that signals which had been sent by the *Ophelia* on ordinary ship's matters when at Kiel were entered in it. In the preliminary affidavit sworn by Pfeiffer on February 13, 1915, he had said that " a separate log for wireless messages was intended to be kept, but had not, in fact, been opened at the time of capture, as the messages were so few." The accounts of the witnesses as to the books which were kept were by no means clear and consistent, and whatever it was that they kept, it was thrown overboard, as will hereafter appear.

On October 17, the day when the message was received by the *Ophelia* at 7 P.M., the four German torpedo-boats which were in the Ems on October 8 were sunk by a British squadron between 2.30 P.M. and 4.30 P.M. Greenwich time (3.30 P.M. and 5.30 P.M. German time) within a radius of six miles from latitude 53° 7′ N. and longitude 3° 40′ E. These torpedo-boats, when on their flight before the British squadron, no doubt sent wireless messages to Norddeich of their peril, and no doubt this was the reason for the wireless message to the *Ophelia;* but the German authorities could hardly have known the particulars of the disaster, and certainly not the exact place of the sinking of their boats, when the message was sent off. The Haaks light vessel's situation is 52° 57′ 8″ N. and 4° 18′ 3″ E., and was therefore a suitable point to direct the *Ophelia* to go to, and doubtless it was intended to send her further instructions whilst she was on her way there. She got under way at 7.30 and proceeded along the coast towards the position where the

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Haaks lightship, which of course had been removed, should have been. The deck log had not been written up at the time of her capture, but we have the loose sheets torn out of the rough log and also translations of them. The figures on the originals are almost undecipherable. The track of the vessel as indicated by the entries on the rough log has been plotted out on the chart handed up, and if this plotting is correctly done it shows that the *Ophelia* did not after noon of the 18th steer straight for the Haaks lightship, but considerably to the west of it, that is to say, very nearly towards the place of the engagement. A British squadron was at midday of the 18th approaching the place of the engagement of the previous day. At 1.20 P.M. James Alexander Cox, the wireless operator on H.M.S. *Lawford*, one of this squadron, heard a very loud signal in code on the 300-metre wave used by German ships. He did not hear the beginning of the message, but he took down and recorded what he did hear, and the letters are set out in his affidavit. He found it was a message from a German ship using the call letters D O P to K A V, which means Norddeich. At the end of the message he heard an answering signal from Norddeich apparently answering or indicating the receipt of the message he had taken down. At 1.30 he reported to his captain that a German ship in their vicinity was making code messages to Norddeich, and in a very few minutes the ship was sighted and proved to be the *Ophelia*. From the affidavit of the captain of the *Lawford*, it appears that the *Lawford* at 1.30 was in latitude 52° 56′ N. and longitude 3° 50′ E. The *Ophelia* when sighted was about six miles from the *Lawford*, and, from the affidavit of Lieutenant Peters, of the *Meteor*, another ship of the same British squadron, it appears that the *Ophelia*, when sighted, was to the eastward of the squadron and proceeding westward. The position of the *Ophelia* at the time she sent the message which was overheard by Cox must therefore have been approximately latitude 52° 56′ N. and longitude 4° E. The time when she sent that message was 1.20 P.M. English time, 2.20 P.M. German. It is most important to bear in mind this time and this approximate position.

The *Ophelia* was stopped and was boarded by Lieutenant Peters, who gives his account of what happened in an affidavit. He requested to see the ship's papers, and was shown the certificates

of the ship being adapted for a hospital-ship, and of her name having been sent in, which he states appeared to him to be in order, as in fact they were. He was told that the ship had been ordered to proceed to latitude 52° 51′ N. and longitude 3° 55′ E. and to look around. The lieutenant asked if these orders were in writing. He was told by Captain Pfeiffer that in the first instance he had been ordered to proceed to sea, but that, "*when outside* the harbour," he had received the order as to the locality by wireless telegraphy. The harbour being Heligoland, which he had left on the previous night, this would be a curious way of saying that he received the orders about an hour and a half or less before the conversation. On demand, the paper purporting to be the wireless message was produced, and it was produced before their Lordships. It is on a similar form to the previous message, but the time and date of its receipt are not entered in the space provided for the purpose. The words "open," "sealed," "decoded," are all left unstruck through, but it was stated at the trial by the German witnesses that it was an open message. The captain told Lieutenant Peters that he did not know what he was to look for, but possibly it was dead bodies. He was unable at the trial to say for certain when he first heard of the sinking of the four German gunboats, but he thinks that it was Lieutenant Peters who told him of it. Nothing appears to have been said on Lieutenant Peters' visit as to any wireless message being sent from the ship, either asking for orders or any other message, and Lieutenant Peters did not tell Pfeiffer that any message had been overheard. The vagueness of the answers given and the circumstances generally excited suspicion, and the *Ophelia* was ordered to follow the *Meteor* to Yarmouth, which she did. In the affidavit of Pfeiffer of February 13, stating the grounds of the claim, he swore (paragraph 5): "To the best of my knowledge, the wireless telegraphy apparatus on board the said ship was used on two or three occasions only to receive urgent orders. No wireless message was sent from the ship, except one to Norddeich on October 18, asking for orders, which message was evidently heard by the British squadron. . . . . A true record of all messages received or sent by this means during the voyage was kept on slips of paper, intended to be copied into a log, to which slips I crave leave to refer. A separate log for wireless messages was intended to be

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kept, but had not in fact been opened at the time of capture, as the messages were so few."

This is, of course, not in strict accordance with the facts as afterwards stated by him in evidence. In evidence Pfeiffer stated that he got to the place of the Haaks lightship at noon of the 18th. That he *then* sent a wireless message to Norddeich, of which there was no copy, but which he recollected to be : " Please send on following message to Wurtemberg. Am at Haaks lightship. Request further instructions."

Being asked at what time this message was sent he said : " It must have been about 1 o'clock, but it may have been half-past 12 or later."

Then he said that he received the reply, " Search 3° 55′ E. 52° 51′ N. and neighbourhood," and that he received that message about 2 o'clock. In cross-examination by the Attorney-General, when asked about the two messages to the ship, he said : " The latter [i.e., the message to the ship in *code*] was chronologically the earlier. It was on the 17th, while the other (i.e., the open one) was on the 18th *at noon*."

Then at question 435 he says that the message from the ship was sent about 1 o'clock. Captain Ridder, the navigating captain of the *Ophelia*, in his evidence said that they got near the Haaks lightship about 1 o'clock, and that they then had had no further instructions ; that he did not know what messages were sent or received, but that he afterwards had instructions from Pfeiffer to go to a particular latitude and longitude, which he could not remember. Grau, the wireless operator of the *Ophelia*, deposed to the receipt and sending of the various messages on the 17th and 18th. As to the time of his *sending* the wireless message he said, " That was towards noon—about noon." This was wholly inconsistent with the case of the claimant, which was that the message overheard by Cox at 1.20 English time, 2.20 German, was that sent by the *Ophelia* asking for directions. An effort was made to explain Grau's evidence by suggesting that by noon he merely meant midday, and that this would not be inconsistent with 2.20 P.M., but that cannot be accepted.

At the trial the then Attorney-General assumed that the overheard message was, as the other side asserted, a message asking

for further directions, but the learned President evidently was not satisfied about this. Question 437 shows this, and also his examination of the witness Grau (questions 1388 to 1392) as to there being in the code used four letters to every word. In a passage not printed in the record, but which was read by counsel from the shorthand notes of the Solicitor-General's reply, the President said: "At the present moment the message which was intercepted has been rather assumed to be the message which was said to have been sent; but it might not have been, and I was trying to get from the witness this morning something which would enable me to say whether that was so or not."

In giving judgment the President no doubt proceeded on the assumption of the Attorney-General that the messages were the same. On the argument of the appeal it was contended that it was not open to the present Attorney-General to rely on the point that the overheard message could not be that which the German witnesses say that it was. Their Lordships are not of that opinion. If the claimant had been induced by the late Attorney-General's conceding this point to him to refrain from tendering evidence which he otherwise might have given, it might have been otherwise; but that was not so. The evidence was all given and it is upon that evidence that the point arises. If the judgment below had been against the Crown, it might have been more doubtful whether an appeal could have been supported on a ground not taken, but it is clearly admissible to support a judgment upon a point not relied on below where the evidence which raised the point is all before the Court.

As has been pointed out, not only was the time when the message was overheard quite inconsistent with the German story, but also the place where the vessel was when the overheard message was sent off was also inconsistent with it. The Haaks lightship is situated (or would be if in her place) in latitude 52° 57′ 8″ N. and longitude 4° 18′ 3″. As already pointed out, the *Ophelia* when she sent off the message must have been approximately in latitude 52° 56′ N. and longitude 4° E. That is to say, if she ever was at the station of the Haaks lightship, she had before asking for or getting the directions to go to 52° 51′ N. and 3° 55′ E. already by some prophetic instinct gone a considerable distance in the general direction

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she was afterwards ordered to go, and that without any knowledge of the disaster which had in fact taken place on the previous day. Further, the information which the President elicited from the witness Grau as to the character of the " H V B " code makes it difficult to see that the message as taken down by Cox could correspond with the message stated by Pfeiffer. He professes to swear to the exact words, but he might be clever enough to vary them in order to avoid giving a clue to the code, so perhaps this point is not a very strong one. Further, again, if the message to go to the named latitude and longitude which was not in code was really received after the message which was overheard by Cox, it is remarkable that that open message was not heard either by Cox or any other wireless operator of the squadron. True, to hear it the operator must have been listening on the German wave, but that they probably all did from time to time as Cox did. On this evidence it appears certain that the *Ophelia* must have received the directions where to go to a considerable time before 2.30 German time when Cox heard her message in code, and if so that message could not have been a request for directions. There is, therefore, very strong reason on the evidence before the Court for distrusting the claimant's explanation of the message which the *Ophelia* was detected in sending. Apart from these reasons, the conduct of those in charge of the *Ophelia* was such as to disentitle them to credit, and it is on that ground that the judgment of the learned President mainly proceeds. There are three matters to be considered in their admitted conduct: First, the propriety of a hospital-ship sending any message in a secret code; secondly, the neglect to keep proper records of the orders to and the doings of the ship; and thirdly and most important, the destruction of such records as there were.

What the Hague Convention says as to wireless installation is that " the fact of the presence on board " (" le fait de la présence à bord ") of a wireless installation shall not take away the protection, but it says nothing to justify sending messages—all of which when sent by a hospital-ship ought to be of innocent character—in a secret code. Counsel in arguing the appellant's case were able to put various cases where orders sent to a hospital-ship might be such as it would be justifiable to give in a secret code to avoid their disclosure to the enemy, but they were unable to suggest any message which it

would be right for a hospital-ship to send and which could properly be concealed from the enemy. As to the message alleged by German witnesses to have been that sent by the *Ophelia* asking for instructions, there can be no possibility of suggesting any necessity for sending it in secret code. The message which is alleged to have been sent in answer to it was itself an open one. Their Lordships are quite unable to suggest any circumstances which could justify a hospital-ship in sending a message by a secret code; but without laying down an absolute rule that the mere sending by a hospital-ship of such a message would of itself forfeit her right to protection and subject her to capture and condemnation, it may certainly be said that if such messages are sent a clear and satisfactory record of them must be kept, so that when the right of search is exercised there may be reasonable evidence to produce of the messages which have been sent and of their innocent character and of the necessity for sending them in a secret code. It would not be necessary in such a record to set out the identical words so as to give a key to the code in the event of the message having been overheard and taken down. The effect might be stated, and in a regularly kept and apparently full signal log such entries would be entitled to considerable credit.

It would, in their Lordships' opinion, be the duty of a hospital-ship, even if not equipped with a wireless installation, and still more so when so equipped, to keep a full and correct log. It is a custom of the sea, very long established, that sea-going vessels shall keep logs. Originally, no doubt, logs would be required, as indeed they are now, for the navigation of the vessel, and when the weather prevented astronomical observations being taken a ship would be ignorant of her position without a record of courses steered and estimated rates of sailing. But it has been the custom to make the log a full record of the voyage and all that happens on it. In some countries the log is legal evidence of the matters contained in it. In this country it is subject to the overriding rule of evidence that a man cannot (subject to some exceptions in case of death and the like) make evidence in his own favour by entries in his own books. But even in our Law Courts a well-kept log is, in all disputes arising out of or in connection with the voyage, treated as of very great weight; and between merchants and underwriters and others doing

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business connected with the sea it is in practice treated as conclusive, unless by external or internal evidence it is falsified.

In Prize Courts in particular the log has always been treated as a most important document. Formerly, no doubt, all entries connected with the voyage were in one book, *the* log, but at the present time often more than one log is kept: a steamer has her engine log, because the entries in it can thus be made direct by the engineer instead of his having to give details to the mate for entering in the ship's log. So it has become fairly common in vessels which do much signalling to keep a separate signal log, the entries in which are made by the signalling officer. In the case of the *Ophelia* the principal log, or deck log, is not very satisfactorily kept. It often omits courses and other things which would be useful to throw light on the employment of the ship. As incidentally remarked already, it occasionally contains an entry of a signal received, but omits to record the next signal said to have been received. This would be likely to occur if no separate signal log were kept. Having regard to the danger of improper signalling by hospital-ships, a signal log should certainly be kept by them. As to what was done in the way of keeping a signal log by the *Ophelia*, the evidence is most confused and conflicting. Some of it has already been referred to.

As to the Morse signals, the witnesses say a book was kept, but no one knows much about it, and the signalmen who kept it are vouched but they are not called. The only signalman called was Grau, the wireless operator, and he, after giving a good deal of confusing evidence, finally said that he knew nothing about the Morse signals. As to wireless messages, he said he did make entries of them in what he called the F. T. book ("Funken Telegraphie"), and that in that book he entered various quite unimportant messages which he sent on ship's business at Kiel. At question 1260 he distinctly told the President there were two books—one the F. T. book and another for the wireless news of events supposed to be happening circulated from Norddeich for the benefit of the world in general. This evidence as to the F. T. book was, of course, in contradiction of the affidavit of Pfeiffer already referred to. There seems, taking the evidence as a whole, the greatest uncertainty as to what books recording signals were really kept; but the one thing which is certain is that any which were kept, except the news log,

were thrown overboard when it was seen that the vessel was about to be searched. If nothing but innocent signals had been sent, the signal log was the very book of all others which should have been preserved. The result, therefore, is that the appellant has nothing to show to vouch his story that all signals sent (including the one so unnecessarily, according to his account of its purport, sent in secret code) were of an innocent character. Further, the absence of such evidence, if any ever existed, is caused by his own act.

This leads to the subject of what is technically called spoliation of documents, on which the President, rightly, as their Lordships think, laid much stress. The authorities on the subject are carefully reviewed in his judgment, and these authorities and others were quoted on the appeal by the appellant's counsel. In considering these authorities it is necessary to recollect that the procedure in the Prize Court has been very substantially altered by the new rules abolishing the preliminary hearing. The alterations in modes of doing business in modern times may have made this preliminary hearing not quite so useful as it was formerly, and some modification of procedure may have been desirable; but the total abolition of a preliminary hearing seems to their Lordships, as has been remarked during the argument of this and other cases before this Board recently, to operate occasionally against the interests of the Crown. Certainly the procedure in the present case has given an advantage to the claimant which he would not have had under the old procedure.

In the cases as to spoliation of documents, the point has frequently arisen on the preliminary hearing on documents, and the question has been debated whether or not further proof should be allowed. This point cannot arise under the present procedure, and it may be that in some respects the old doctrine was rather technical. The substance of it, however, remains and is as forcible now as ever, and it is applicable not merely in prize cases, but to almost all kinds of disputes. If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence

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may fairly be considered rebutted, still he has to suffer. He is in the position that he is without the corroboration which might have been expected in his case.

In the present case there are two separate destructions of documents—one the throwing overboard of documents when the vessel was about to be searched, the other the destruction of the accounts relating to the stock and the consumption of signal lights. As to the first, the Attorney-General admits that the destruction of the code book to prevent it getting into enemy hands is at least excusable. It is, indeed, so obvious that that must at any rate be done that complaint could not be made of it. But Captain Pfeiffer naïvely admitted that, when throwing overboard documents to avoid their getting into enemy hands, he acted on the principle of throwing overboard too many rather than too few, and adds that the Morse signal book contained absolutely innocent messages, which could be read by any one. That probably was so, but it may also have contained some which were not so innocent; and it is pretty obvious that when he threw it overboard he either knew it did or was not sure that it did not.

The Morse signal book could not have disclosed or given any key to the wireless signal code, so there could be no reason for destroying it, except the consciousness that as something wrong had in fact taken place it might be disclosed by the book. As pointed out, a wireless signal log might have been kept in such a way as not to disclose the code or give any key to it. The destruction of the stock book of signal lights cannot be excused by any fear of disclosing a secret code. It is suggested that it was innocent because the guard on the ship was told it was being done, and that British officers had already examined it. British officers would not in the first instance examine minutely documents of that kind, but would assume that if wanted they could be looked over afterwards. Pfeiffer and the paymaster doubtless knew what the signal lights really were for, and hoped that the British, who up to that time had made no point about it, would not find it out, so they destroyed the book. Nothing that can be called a reason was given for doing so. Even if the books had become waste paper, why destroy them?

Their Lordships are of opinion that Captain Pfeiffer and the other witnesses have by their acts put themselves in such a position that

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their evidence cannot be relied on ; that the evidence discloses facts of which no satisfactory explanations are or can be given ; and that although on the Crown affidavit evidence some ambiguities have been pointed out which have not been cleared up by cross-examination or re-examination, yet there are incriminatory matters in those affidavits to which no answer has been given. They are of opinion that the President was fully justified in finding that the *Ophelia* was not constructed or adapted *or used* for the special and *sole* purpose of affording aid and relief to the wounded, sick, and shipwrecked, and that she was adapted and *used* as a signalling ship for military purposes. Their Lordships agree in that finding, which of course justifies the condemnation of the vessel as lawful prize. They will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant : *Hewitt, Woolacott & Chown.*
Solicitor for respondent : *Treasury Solicitor.*

E. C. T.

[HOUSE OF LORDS.]

H. L. (E.)*
1916
April 13.

O'GRADY . . . . . APPELLANT ;

AND

WILMOT AND OTHERS . . . . . RESPONDENTS.

Revenue—Estate Duty—Incidence—Personal Property—Exercise by Will of General Power of Appointment—"Property which does not pass to the executor as such"—Real Estate settled on Trust for Sale—Reconversion—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

Personal property appointed by will in exercise of a general power of appointment is "property which does not pass to the executor as such" within the meaning of s. 9, sub-s. 1, of the Finance Act, 1894, and consequently the estate duty payable in respect thereof is a first charge on the property.

In re Hadley [1909] 1 Ch. 20 ; *In re Moore* [1901] 1 Ch. 691 ; *In re Dixon* [1902] 1 Ch. 248 ; *In re Fearnsides* [1903] 1 Ch. 250 ; and *In re Orlebar* [1908] 1 Ch. 136 overruled.

In re Treasure [1900] 2 Ch. 648 ; *In re Maddock* [1901] 2 Ch. 372 ; *In re Power* [1901] 2 Ch. 659 ; and *In re Dodson* [1907] 1 Ch. 284 followed on this point.

* *Present :* LORD BUCKMASTER L.C., LORD ATKINSON, LORD SUMNER, and LORD PARMOOR.

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The estate duty payable in respect of such property is not included in a direction to pay testamentary expenses.

In re Treasure [1900] 2 Ch. 648 overruled on this point.

Testatrix, in the exercise of a general power of appointment over the proceeds of sale of real estate which was settled by her marriage settlement upon trust for sale at her request during her life, and after her death at the discretion of the trustees, by her will appointed that the trustees of the settlement should stand possessed of "the hereditaments, property, money, stocks, funds and securities" which should be subject to the trusts of the settlement upon trust to "convey assign transfer and pay" the same to the trustees of the will; and she thereby appointed the same to the trustees of the will upon trust for sale and conversion and to pay the income to her husband for life, and after his death to hold the same upon certain other trusts; and she gave her residuary estate, subject to the payment of her funeral and testamentary expenses and debts and legacies, to her husband, whom she appointed her executor. She also directed that the appointed property should not be sold during the lifetime of her husband without his consent. The real estate in question remained unsold at the date of the death of the testatrix:—

Held, (1.), distinguishing *In re Lord Grimthorpe* [1908] 2 Ch. 675, that the will did not operate as a reconversion of the appointed property and that the property passed on the death of the testatrix as personalty; and by Lord Buckmaster L.C., Lord Atkinson, and Lord Sumner, Lord Parmoor dissenting, (2.) that the estate duty payable in respect thereof was a first charge on the property; (3.) that such estate duty was not thrown upon the residue by the direction for payment of the testamentary expenses.

Decision of the Court of Appeal [1915] 1 Ch. 613 reversed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Eve J. (2)

By an indenture dated November 28, 1881, executed in contemplation of the marriage between the appellant, the Hon. Frederick Standish O'Grady, and Mary Theresa Burdett O'Grady, then Mary Theresa Burdett Empson, the said Mary Theresa Burdett O'Grady conveyed her undivided moiety in certain freehold hereditaments in Northumberland to trustees upon trust, after the solemnization of the marriage, upon the request in writing of the said Mary Theresa Burdett O'Grady during her life, and after her death at the discretion of the trustees, to sell the same and to stand possessed of the net proceeds of such sale upon the trusts of an indenture of settle-

(1) [1915] 1 Ch. 613. (2) [1915] 1 Ch. 39.

ment of even date therewith. By the said indenture of settlement it was declared that the trustees should invest the net moneys to arise from any sale under the said trust for sale in manner therein mentioned, and should stand possessed thereof and of the stocks, funds, shares, and securities representing the same upon trust for such person or persons and for such purposes and in such manner as the said Mary Theresa Burdett O'Grady should by deed or will appoint, and in default of appointment upon trust to pay the income thereof to the said Mary Theresa Burdett O'Grady during her life, and then to the appellant if he should survive her during his life, and after the death of the survivor upon trusts for the benefit of the children of the marriage.

Some small portions of the trust premises were sold during the lifetime of the said Mary Theresa Burdett O'Grady and the proceeds appointed to herself, but the bulk of the property remained unsold at her death.

By her will dated October 25, 1909, the said Mary Theresa Burdett O'Grady, after reciting the indentures of conveyance and settlement of November 28, 1881, in exercise of the power of appointment reserved to her thereunder, appointed that the trustees of the said settlements should from and after her decease stand possessed of "all the hereditaments, property, money, stocks, funds, and securities of whatsoever nature" which should be subject to the trusts of the said indentures, upon trust to convey, assign, transfer, and pay the same to the trustees of her will. And the testatrix thereby devised, bequeathed, and appointed the same and all other her property in Northumberland (thereinafter called her trust estate) unto her trustees upon trusts to sell, call in, and convert the same into money at such times and in such manner as they should think fit and invest the proceeds as therein mentioned, and upon trust, subject to an annuity to her brother, the respondent G. W. T. Coventry, to pay the income of the said trust estate to the appellant for his life, and after his death upon trust to hold the said trust estate as therein mentioned. And the testatrix gave all the residue of her real and personal estate, subject to the payment of her funeral and testamentary expenses and debts and legacies, to the appellant. The testatrix also empowered her trustees to postpone the sale and conversion, and directed that they should not during the lifetime of

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the appellant without his consent sell any part of the estates and property to the income whereof he was under the will entitled for life, and she appointed the appellant her executor. The testatrix died on January 12, 1910, and her will was duly proved by the appellant. There was no issue of the marriage.

The two first named respondents, R. C. Wilmot and G. W. T. Coventry, were the existing trustees of the will, and the latter and the two last named respondents, G. W. Coventry and R. G. T. Coventry, were interested in the gift over of the appointed property.

The respondent R. C. Wilmot did not file a separate case and took no part in the appeal.

A question having arisen whether the estate duty payable in respect of the appointed property was payable out of that property or out of the residuary personal estate of the testatrix, an originating summons was taken out by the appellant against the respondents to determine this question.

Eve J. held that the testatrix intended to put an end to the trust for sale, and that the estate duty payable in respect of the appointed property was not payable out of residue, but was charged on the land the subject of the appointment as property which did not pass to the executor as such within s. 9, sub-s. 1, of the Finance Act, 1894.

The Court of Appeal (Lord Cozens-Hardy M.R., Phillimore L.J., and Joyce J.) held that the property was in equity, at the time of the death of the testatrix, personalty which, under the decision in *In re Hadley* (1), passed to the executor as such, and that therefore the estate duty in respect thereof was not charged upon the appointed property, but was payable out of the residuary estate.

Feb. 1, 3, 4, 7. *Maugham, K.C.*, and *A. J. Spencer* (for *F. H. L. Errington*, serving with His Majesty's Forces), for the appellant. 1. Personal property appointed by will in exercise of a general power of appointment does not pass to the executor as such within the meaning of s. 9, sub-s. 1, of the Finance Act, 1894. "Executor as such" in that sub-section means an executor in his character of a representative, or in other words an executor jure representationis. The phrase "virtute officii" is confusing, because it is sometimes

(1) [1909] 1 Ch. 20.

used with reference merely to the question of the jurisdiction of the Ordinary, and it has not been adopted by the Legislature. Property which reaches the hands of an executor as trustee and not jure representationis does not pass to the executor as such.

The right of a creditor to have recourse to a fund appointed under a general power after the testator's own estate is exhausted is a mere equity, and is not founded on the view that the fund passes to the executor jure representationis: *Thompson* v. *Towne* (1); *Bainton* v. *Ward* (2); *Pack* v. *Bathurst* (3); *Troughton* v. *Troughton* (4); *Lord Townshend* v. *Windham* (5); *Harrington* v. *Harte* (6); *Holmes* v. *Coghill* (7); *Thorpe* v. *Goodall* (8); *Daubeny* v. *Cockburn.* (9) The appointee becomes a trustee for the creditor: *Jenney* v. *Andrews* (10); *Williams* v. *Lomas.* (11) In *Platt* v. *Routh* (12), affirmed sub nom. *Drake* v. *Attorney-General* (13), it was held that personal property appointed by will under a general power of appointment was not liable to probate duty, and all the judges agreed that this property did not pass to the executor as such. Lord Abinger said that it was certain that the executor qua executor could have no title to any part of the appointed property. Lord Langdale said that the property was not the property of the appointor and could not be recovered by her executors by virtue of the probate, and Lord Lyndhurst said that the executor took nothing in the appointed property. In *Tugman* v. *Hopkins* (14), where a will was made simply in exercise of a general power, it was held that the executors did not take jure representationis. The right of the creditor to be paid in the last resort out of the appointed property extends also to real estate whether the debt is a specialty debt or a simple contract debt, but such property is not the personal or real estate of the testator: *Fleming* v. *Buchanan* (15), approved in *Beyfus* v. *Lawley.* (16) This right therefore cannot depend on the

(1) (1694) 2 Vern. 319.
(2) (1741) 2 Atk. 172.
(3) (1745) 3 Atk. 269.
(4) (1747) 3 Atk. 656.
(5) (1750) 2 Ves. Sen. 1, 11.
(6) (1784) 1 Cox, 131.
(7) (1802) 7 Ves. 499; (1806) 12 Ves. 206.
(8) (1811) 17 Ves. 388.
(9) (1816) 1 Mer. 626.
(10) (1822) 6 Madd. 264.
(11) (1852) 16 Beav. 1.
(12) (1840) 6 M. & W. 756, 791; (1841) 3 Beav. 257, 281.
(13) (1843) 10 Cl. & F. 257, 285—6.
(14) (1842) 4 Man. & G. 389.
(15) (1853) 3 D. M. & G. 976.
(16) [1903] A. C. 411.

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view that the property is vested in the executor. Then is the appointed property legal or equitable assets? There are many distinctions between legal and equitable assets. Legal assets are assets over which the executor has a right of retainer, and in the case of legal assets the assent of the executor is necessary before the property can pass to the legatee. Further, at common law until recent times the specialty creditor had a right to exhaust the fund before recourse could be had to it by the simple contract creditor, whereas in the case of equitable assets equity followed its rule of equality. Legal assets are those which an executor is bound to account for at law on a plea of plene administravit. All other assets are equitable assets. The duty of the executor is limited to seeing that the assets which vest in him as personal representative are wholly applied in the payment of the debts. He owes no general duty to pay debts. In *Cook* v. *Greyson* (1) Kindersley V.-C., in distinguishing between legal and equitable assets, says that the distinction refers to the remedies of the creditor and not to the nature of the property. The question is not whether the testator's interest was legal or equitable, but whether a creditor of the testator seeking to get paid out of the assets can obtain payment from a Court of Law or can only obtain it through a Court of Equity. Then he states the general principle to be that a Court of Law would treat as assets every item of property come to the hands of the executor, which he has recovered, or had a right to recover, merely virtute officii, i.e., which he would have had a right to recover if the testator had merely appointed him executor without saying anything about his property or the application thereof. In *Attorney-General* v. *Brunning* (2) Lord Cranworth says that the test of whether assets are legal or equitable is whether they are money which the personal representative is entitled to recover independently of any directions of the testator, and Lord Chelmsford in terms adopts the test laid down by Kindersley V.-C. Tried by this test this property must be equitable assets and nothing else. The right of the creditor is an equitable right which does not depend upon the rights and obligations of the executor. The executor gets the appointed property, when he does get it, as trustee. In *In re Philbrick's Settlement* (3), where a married woman made a

(1) (1856) 3 Drew. 547, 549.
(2) (1860) 8 H. L. C. 243, 259, 265.
(3) (1865) 34 L. J. (Ch.) 368.

will in exercise of a general power and appointed executors, Romilly M.R. held that the executors, and not the trustees of the deed, were the proper persons to distribute the fund, but he regarded the executors as taking as trustees, and in *Hayes* v. *Oatley* (1) he follows his previous decision; but in *Pardo* v. *Bingham* (2) he recognizes that property appointed by will under a general power of appointment is equitable assets, and this point was not there contested; and see *In re Davies' Trusts.* (3) *In re Hoskin's Trusts* (4) shows that the executor can give a receipt for the appointed fund, but that does not mean that it is property passing to him jure representationis. That case merely followed *In re Philbrick's Settlement.* (5) The dictum of James L.J., upon which the modern practice is founded, as to the right of the executor to give a receipt for the appointed property appears to be based on convenience, and it is so put by Swinfen Eady J. in *In re Peacock's Settlement.* (6) It has never been suggested that the executor takes the property jure representationis. As to the cases decided under the Finance Act, 1894, after a great conflict of judicial opinion, it was eventually held by the Court of Appeal in *In re Hadley* (7), reversing the decision of Parker J., that personal property appointed by will under a general power was property passing to the executor as such. In that case it was admitted by counsel for the appellant that the appointed property was equitable assets, and it had always been so treated in the older authorities; but notwithstanding that admission Cozens-Hardy M.R. decided the contrary. That is directly opposed to what was said by Lord Lindley, delivering the judgment of the Privy Council, in *Commissioner of Stamp Duties* v. *Stephen.* (8) In substance this is an appeal from the decision of the Court of Appeal in *In re Hadley.* (7) Prior to *In re Hadley* (7) it had been decided by Kekewich J. in *In re Treasure* (9) and *In re Maddock* (10), by Byrne J. in *In re Power* (11), and by Warrington J. in *In re Dodson* (12) that such property did not pass to the executor as such; and by Buckley J.

(1) (1872) L. R. 14 Eq. 1.
(2) (1868) L. R. 6 Eq. 485.
(3) (1871) L. R. 13 Eq. 163, 166.
(4) (1876) 5 Ch. D. 229; (1877) 6 Ch. D. 281.
(5) 34 L. J. (Ch.) 368.
(6) [1902] 1 Ch. 552.
(7) [1909] 1 Ch. 20.
(8) [1904] A. C. 137, 140.
(9) [1900] 2 Ch. 648.
(10) [1901] 2 Ch. 372.
(11) [1901] 2 Ch. 659.
(12) [1907] 1 Ch. 284.

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in *In re Moore* (1) and *In re Dixon* (2), by Swinfen Eady J. in *In re Fearnsides* (3), and by Neville J. in *In re Orlebar* (4) that it did. But in *In re Fearnsides* (3) Swinfen Eady J. admitted that the appointed property was equitable assets. Cozens-Hardy M.R. based his decision to the contrary on a passage in Williams on Real Assets, p. 13, but it is submitted that that passage is contrary to the authorities and is wrong. Such property is treated as equitable assets in Robbins and Maw's Devolution of Real Estate and Administration of Assets, 4th ed., p. 129 ; in Walker and Elgood on Administration Actions, p. 165, note (*a*) ; and in Snell's Principles of Equity, 16th ed., p. 195. [They also referred on this point to Sugden on Powers, 8th ed., pp. 473–4 ; Williams on Executors, 10th ed., vol. 2, pp. 1302–7 ; Farwell on Powers, 2nd ed., p. 254 ; Seton's Judgments and Orders, 6th ed., p. 1672.] If this property is legal assets, how is the executor to be made liable on a plea of plene administravit ?—Williams on Executors, 10th ed., vol. 2, p. 1583.

2. This property passed on the death of the testatrix as real estate. Upon the construction of the will the testatrix intended that her husband should enjoy the appointed property in specie and put an end to the trust for sale, as it was competent for her to do—*Stead* v. *Newdigate* (5)—so that the property passed to the trustees of the will as unconverted real estate : *In re Lord Grimthorpe.* (6)

3. The estate duty on the appointed fund is not thrown on the residue by the direction to pay funeral and testamentary expenses. Upon this point Parker J. was wrong in *In re Hadley* (7), but he treated the matter as settled by authority. The term " testamentary expenses " includes estate duty in respect of the bona testatoris —i.e., so far as it takes the place of the old probate duty—but does not include estate duty which the executor will have to pay to get probate, where under the statute he can recover it : see s. 9, sub-ss. 1 and 4. This clause was not intended to alter the incidence of the duty. It is a common form clause, which is inserted merely for the purpose of defining the residue. *In re Clemow* (8) decided that " testamentary expenses " included estate duty and extended to the

(1) [1901] 1 Ch. 691.
(2) [1902] 1 Ch. 248.
(3) [1903] 1 Ch. 250.
(4) [1908] 1 Ch. 136.
(5) (1817) 2 Mer. 521, 531.
(6) [1908] 2 Ch. 675.
(7) [1909] 1 Ch. 20.
(8) [1900] 2 Ch. 182.

expenses of administration under an intestacy, but it does not touch the point under discussion. *In re Treasure* (1) is opposed to the appellant's contention on this question, but Kekewich J. was not there dealing with the point that the statute had provided for a return of the duty, and apparently that point was not brought to his notice. *In re Sharman* (2) decides that estate duty on land is not included under the term "testamentary expenses." Therefore, if this property passed as land, the direction to pay testamentary expenses does not apply. It has also been held that the term does not include estate duty in respect of an unappointed fund: *Porte* v. *Williams* (3); or in respect of a donatio mortis causa: *In re Hudson.* (4) Those two cases support the appellant's contention. *In re King* (5) shows that settlement estate duty on personalty is not a testamentary expense, but payment of that duty is not a condition precedent to obtaining probate. There is no foundation for the view that a mere direction to pay testamentary expenses is a legacy of the amount of the duty to a person who takes property either outside the will altogether or under a power of appointment.

Clayton, K.C., and *Cecil Bovill*, for the three last named respondents. 1. At the moment of the death of the appointor the appointed property was notionally personal estate, and was therefore personal estate for fiscal purposes. An election in the will to reconvert would be operative only so far as the appointees were concerned and would not affect the rights of the executor, who takes in spite of the will, or of the creditors. *In re Lord Grimthorpe* (6) is distinguishable because there the property belonged to the testator absolutely and he could do as he liked with it. Here the power only operated upon the proceeds of sale.

2. If personal estate, whether or not it passes to the executor as such, it is freed from the duty by virtue of the express direction in the will as to testamentary expenses. This duty is clearly a testamentary expense, for it must be paid as a condition precedent to proving the will: *In re Treasure* (1); *In re Moore* (7); *In re Hadley.* (8) *Porte* v. *Williams* (3) and *In re Hudson* (4) are

(1) [1900] 2 Ch. 648.
(2) [1901] 2 Ch. 280.
(3) [1911] 1 Ch. 188.
(4) [1911] 1 Ch. 206.
(5) [1904] 1 Ch. 363.
(6) [1908] 2 Ch. 675.
(7) [1901] 1 Ch. 691.
(8) [1909] 1 Ch. 20.

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distinguishable in their facts because in those cases the will was not the operative instrument, but they are inconsistent with the principle of the earlier authorities. In *In re Fearnsides* (1), in the view taken by Swinfen Eady J., it became unnecessary to decide the point, but he expresses his opinion that the direction as to testamentary expenses did impose the duty on the residue, and he accepts *In re Clemow*. (2)

3. The appointed property passes to the executor as such. The exercise of the power is the event which gives rise to the assets, and as soon as that event arises the executor takes them by virtue of the probate alone and regardless of the intention of the will. He takes them for the purpose of paying the debts, and the fact that he may act as trustee when he has performed his executorial duties does not militate against the view that he takes as executor. He has a title to the property, and the foundation of his title is his office. The executor is the proper person to enforce the right of the creditors over the appointed fund, and it is significant that no case can be found in the books where this equity has been asserted in the absence of the executor. There is nothing in the cases to show that he does not take as executor. In *In re Philbrick's Settlement* (3) Romilly M.R. held that the duty of administering the fund was committed to the executors, and the reason why it was said that the executors held as trustees was that at that time, the appointor being a married woman, there could be no debts to which the appointed property would be liable. That was subsequently altered by the Married Women's Property Act, 1882. *Hayes* v. *Oatley* (4) again proceeded on the view that the executor had a title to the fund. In *In re Hoskin's Trusts* (5) the point was thought to be so plain that the trustees of the settlement containing the power, who had refused to pay over the appointed fund to the executors, were ordered to pay costs. There Malins V.-C. proceeded on the view that the executors had a title to the fund and could give a good discharge for it, and this view was expressly approved by James L.J. In *In re Peacock's Settlement* (6) the principle of *In re Hoskin's Trusts* (5) was applied to an administrator with the will annexed, and in *In re Lawley* (7)

(1) [1903] 1 Ch. 250.
(2) [1900] 2 Ch. 182.
(3) 34 L. J. (Ch.) 368.
(4) L. R. 14 Eq. 1.
(5) 5 Ch. D. 229; 6 Ch. D. 281.
(6) [1902] 1 Ch. 552.
(7) [1902] 2 Ch. 799, 807.

the dictum of James L.J. was cited with approval by Cozens-Hardy L.J. The language of Lord Hardwicke in *Lord Townshend* v. *Windham* (1) strongly supports this view. The dicta in *Platt* v. *Routh* (2) and in the same case before the House of Lords (*Drake* v. *Attorney-General* (3)) are obiter only, the only point decided in that case being that the appointed property was not the property of the testatrix, and that is not disputed. Further, the dictum of Lord Abinger is explained by Romilly M.R. in *In re Philbrick's Settlement.* (4) The words " as such " in s. 9, sub-s. 1, of the Finance Act, 1894, bear the same meaning as the words " as executor " in s. 8, sub-s. 3, whereby the executor is made accountable for estate duty in respect of all personal property which the deceased was competent to dispose of at his death—and that includes property which passes by the exercise of a general power of appointment—but he is not to be liable for any duty in excess of the assets which he has received " as executor," or might but for his neglect or default have received. " Assets received as executor " in that sub-section include personal property appointed by will in exercise of a general power, and if so it cannot be properly held that the same assets do not pass to the executor " as such " within the meaning of s. 9, sub-s. 1 : *In re Fearnsides.* (5)

4. The question whether appointed property is legal or equitable assets is not a material consideration upon the construction of this Act. The Act says nothing about legal or equitable assets or virtute officii or de jure representationis and was not intended to perpetuate these refinements. But, assuming that the question is relevant, the Master of the Rolls was right in holding that this property was legal and not equitable assets. His considered opinion, supported by the high authority of Mr Joshua Williams, is to be preferred to the casual dicta of Lord Lindley in *Commissioner of Stamp Duties* v. *Stephen* (6) and Swinfen Eady J. in *In re Fearnsides.* (7) *Cook* v. *Gregson* (8) was not a case dealing with appointed property at all, and the observations of Kindersley V.-C. must be considered with reference to the subject in hand, which was an equity of redemption.

(1) 2 Ves. Sen. 1, 11.
(2) 6 M. & W. 756.
(3) 10 Cl. & F. 257, 286.
(4) 34 L. J. (Ch.) 368.
(5) [1903] 1 Ch. 250, 256.
(6) [1904] A. C. 137.
(7) [1903] 1 Ch. 250.
(8) 3 Drew. 547.

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The distinction does not depend upon the nature of the assets, that is, upon whether the estate or interest is legal or equitable; nor does it depend upon the forum to which the executor must resort to recover the assets; it depends upon whether the assets can only be made available at the instance of the creditor in a Court of Equity. It is the bounty of the testator or the intention in favour of the creditor which makes assets equitable assets, and unless there is a trust or charge, which for this purpose is equivalent to a trust—*Bailey* v. *Ekins* (1)—for payment of debts, the assets are legal. If so, the appointed property is not equitable assets, because the creditors do not take under the appointment but in spite of it: *Fleming* v. *Buchanan.* (2) In early times the heir was only liable for the debts of his ancestor by specialty in which the heir was expressly named. Then when lands became devisable they were not subject to the payment of the testator's debts of any kind in the hands of the devisee. But if the lands were devised in trust for payment of debts they became subject to all debts equally. The debts were recoverable only in a Court of Equity by reason of the trust, and they were recoverable equally on the principle that equality is equity. Such a devise made the property not legal but equitable assets. Then came the Statute of Fraudulent Devises (3 Will. & Mar. c. 14), repealed and re-enacted by 11 Geo. 4 & 1 Will. 4, c. 47, which made all devises void as against creditors by specialty in which the heir was bound. That was followed by Sir John Romilly's Act (Administration of Estates Act, 1833) (3 & 4 Will. 4, c. 104), which made all the lands of a deceased person subject to the payment of his debts whether specialty or simple contract, but gave priority to specialty debts in which the heir was bound. On the other hand, where there was a trust for payment of debts there was no priority at all, and that was why it was important to distinguish between legal and equitable assets. Then came Hinde Palmer's Act (Administration of Estates Act, 1869) (32 & 33 Vict. c. 46), which abolished the priority between specialty and simple contract debts, with the result that the distinction between legal and equitable ceased to have much practical effect. In *Silk* v. *Prime* (3) Lord Camden treated the question of equitable assets as

(1) (1802) 7 Ves. 319. (2) 3 D. M. & G. 976, 980.
(3) (1768) 1 Bro. C. C. 138, n.

depending upon the testator's intention, but here the right of the creditors does not rest on the intention of the appointor, but takes effect in spite of it. The question must always depend upon the existence of a trust for payment of debts. [They also referred on this point to Jarman on Wills, 6th ed., vol. 2, p. 2024 ; Lewin on Trusts, 12th ed., p. 1064 ; Roper on Legacies, 4th ed., vol. 2, p. 991 ; Robbins and Maw's Devolution of Real Estate and Administration of Assets, 4th ed., p. 106.]

Maugham, K.C., replied.

The House took time for consideration.

April 13. LORD BUCKMASTER L.C. My Lords, in this appeal three questions arise for determination.

The first is whether, in the special circumstances of this case, certain property, subject to a general power of appointment by deed or will, passed on the exercise of the power by will as real or as personal estate.

The second is whether personal property held subject to such a power passes on its exercise by will to the executor of the will as such within the meaning of s. 9, sub-s. 1, of the Finance Act, 1894 ; and the third is whether by the particular terms of the will in the present instance the estate duty payable in respect of certain appointed property was payable out of the residue. Apart from one sentence in the will there is nothing ambiguous in any of the documents, so that they can be summarized without the necessity of dealing with their exact language.

By a marriage settlement dated November 28, 1881, certain real estate in Northumberland was conveyed to trustees by Mary O'Grady upon trust for conversion, such conversion only to take place during her life at her request in writing ; the property and the proceeds of sale to be held for the purposes and upon the trusts declared by another deed of even date. The deed of even date directed that these trusts should be in favour of such persons as Mary O'Grady, whether covert or sole, by deed or will or codicil expressly referring to that power should appoint, and in default of appointment to her for life and then to her husband for life, and after the death of the survivor upon certain trusts for the issue of the marriage.

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Part of the real estate was sold during the lifetime of Mary O'Grady in accordance with the trusts of the settlements, but part of the property still remains unconverted.

Mary O'Grady duly made her will on October 25, 1909, referred to the power of appointment, and in its exercise appointed that the trustees of the settlements should convey the real estate and all other property subject to the indentures of settlement to her husband and one Arthur George Redout, whom she appointed trustees. She then declared that these trustees were not during the lifetime of her husband without his written assent to sell and convert the property into money, and subject to an annuity they should pay the income to him for life and after his death should hold the same on certain trusts for beneficiaries there named, who are represented by some of the respondents on this appeal.

The residue of her property she gave in these terms: "I devise bequeath and appoint all the residue of my estate and effects whether real or personal or over which I may have any power of appointment by will and not otherwise disposed of subject to the payment of my funeral and testamentary expenses and debts and legacies unto my husband," whom she appointed sole executor of her will. She died on January 12, 1910, and her will was duly proved by the appellant.

No suggestion is made that the appointed fund is needed for payment of debts, nor is there any dispute but that estate duty is payable upon the whole of the property, both that subject to the power of appointment and that of which the testatrix was absolutely possessed, but, if the property subject to the power passed to the executor of the testatrix as such, the duty is not chargeable on the appointed fund and would be paid out of the general assets received by the executor—in other words, out of his own property, he being residuary legatee. If it did not so pass, it is, unless the will otherwise directs, charged on the appointed estate, and in that case the appellant would only bear the loss of income on the amount of the duty.

The question, therefore, is not whether the Revenue will lose any part of the duty, but how, as between various beneficial interests, it is to be apportioned and borne.

If the property passed as real estate, it is conceded that it bears its

own duty, and the appellant must succeed ; but I am unable to find that this is the result of the combined operation of the settlements and the will. Until the general power conferred by the settlements was exercised, the property was converted in equity and must be regarded as personal estate. It was consequently only upon personal estate that the will could operate, and the fact that in the exercise of the power the testatrix expressed her intention that the original trust for sale should cease, and that the property should be treated until the happening of certain events as realty, cannot effect a reconversion so as to make the exercise of the power take effect upon real instead of personal estate.

The case of *In re Lord Grimthorpe* (1), to which your Lordships' attention was directed, in no way conflicts with this view. In that case property was also converted by the settlements which were operative up to the time of the testator's death, seeing that until that event happened it was impossible to determine whether he would have issue who would be interested in default of appointment. Yet, at the moment of his death, he was in fact the absolute owner of the fund, and if he had not exercised the power at all, the property would have passed as his estate. He determined that it should do so as real property, and I think the Court of Appeal were quite right in holding that in those circumstances reconversion had taken place.

The next question is one more difficult to answer, and it is that to which the very full and careful arguments of counsel upon both sides have been chiefly directed. Did this property "pass to the executor" of Mrs. O'Grady "as such" ? Fletcher Moulton L.J. and Farwell L.J. both took the view that it did ; apart from other considerations, because, according to the true construction of the statute, the phrase "passing to the executor as such" simply means "passing to the executor in the character of executor as distinguished from his personal capacity or as trustee" : see *In re Hadley*. (2) This is a simple and inviting solution of a complicated problem, but I am unable to find that it is satisfactory ; and your Lordships must, I think, consider the history of the authorities by virtue of which funds subject to a general power of appointment when exercised by will become liable for so much of the testator's debts as the testator's estate is insufficient to satisfy.

(1) [1908] 2 Ch. 675. (2) [1909] 1 Ch. 20, 33, 36.

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This result is not due to any operation of law, but appears to have been established as an equitable principle at a time when the path of equity was less encumbered by authority than it is at the present day.

The first reported case in which reference to the matter is to be found is *Thompson* v. *Towne*. (1) The judgment is brief, and the relevant passage is contained in the statement that as the testator had power to dispose of a sum of 500*l*. it must be looked on as part of his estate and decreed to be assets liable to the plaintiff's debts; and this was followed in *Lassells* v. *Lord Cornwallis* (2), reported in the same volume, where a similar fund was again declared to be assets to be applied in the same way.

The case of *Bainton* v. *Ward* (3) adds little to the former authorities, for the report is brief, and in part appears to be inaccurate. It proceeds upon the general principle that the legatees would take under a general power as volunteers, and that the creditor's rights are stronger than theirs.

In the case of *Lord Townshend* v. *Windham* (4) the question is for the first time subject to a more elaborate investigation. Lord Hardwicke was there considering the effect of the execution of a general power by deed, which it was argued was different from that of execution by will; this distinction Lord Hardwicke refused to recognize, and, after stating that it was not material, continues with these words: "Nor is there any substantial ground for this distinction; for if there is a power to execute by will or deed, though executed by will, it operates not as a will to that purpose, but as an appointment; not as an appointment of his own assets, but of the estate of another, and takes not place by force of the will; it is therefore a slight and shadow of distinction only"; and he concludes by saying that whatever arose by the deed "ought to be considered as part of the general assets of the testator."

These cases, which were all decided in the Court of Chancery, show that, where debts exist, creditors are entitled to have funds subject to an exercised general power treated as assets for the purpose of paying their debts, but they do not establish that by the mere exercise of the power the property has passed to the executor. For on such an hypothesis the property would pass to the executor

(1) 2 Vern. 319.
(2) (1704) 2 Vern. 465.
(3) 2 Atk. 172.
(4) 2 Ves. Sen. 1, 10, 11.

whether needed for debts or no, a conclusion inconsistent with the reasoning of Lord Hardwicke, who plainly draws no distinction between a deed and a will, and in the former case, if the testator's estate was sufficient to pay his debts, the appointment would be wholly undisturbed. This consideration is important in the present case, since it cannot be suggested that the incidence of duty under s. 9 varies according to the existence, or is measured by the extent of, the debts of the deceased. Some time later, in *Daubeny* v. *Cockburn* (1), Sir William Grant, who was then Master of the Rolls, stated that creditors have "only a general equity to have what is appointed to a volunteer considered as assets, if wanted, for payment of debts"; and again in *Jenney* v. *Andrews* (2) the Vice-Chancellor said that "Where there is a general power of appointment by will, and an appointment is made, the appointee is a trustee for creditors"; on the other hand, in *Fleming* v. *Buchanan* (3) Knight Bruce L.J. declines to give any reason for the rule, and says that "On whatever grounds it was so originally held, it is and has for a long time been the settled law of the country." No further authority throws light upon the matter until the case of *Drake* v. *Attorney-General* (4) in the House of Lords. In that case the question raised was whether personal estate subject to an exercised power of appointment by will became liable to probate duty as being assets of the donee, by whose will the power had been exercised. This depended upon the construction of the words of the third part of the schedule of the statute of 55 Geo. 3, c. 184, by which probate duty was imposed upon "the estate, and effects which the deceased shall have been possessed of or entitled to." It was argued that the fund passed by means of the probate, and that it must be considered as the property of the appointor, but this argument was rejected, and the Lord Chancellor, in the course of the argument, says: "The executor takes nothing under the will. . . . . The proof of the will is the probate, but the executor takes nothing in the property appointed."

The decision of the House followed this reasoning and declared that probate duty did not attach.

In these circumstances an Act was passed in 1860, 23 & 24 Vict.

(1) 1 Mer. 626, 639.
(2) (1822) 6 Madd. 264.
(3) 3 D. M. & G. 976, 980.
(4) 10 Cl. & F. 257, 286.

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c. 15 (the Probate Duty Act, 1860), to which reference is necessary. That statute, by s. 4, imposed probate duty in respect of all personal property disposed of by will under any general power, and continued in these words: "and for the purpose of this Act such personal or moveable estate and effects shall be deemed to be the personal or moveable estate and effects of the person so dying"; and by s. 5 the duties so imposed were made a burden upon the property in respect of which they were paid, and the duty was laid upon the trustees or owners of the fund to pay the same to the person having the burden of the execution of the will. This statute clearly proceeds, in accordance with Lord Hardwicke's judgment, upon the basis that the property which it affected was not in fact the estate of the deceased, and that it did not in fact pass to the executors, and that for the purpose of the Act, and the purpose of that Act alone, it was to be regarded as being that which it was not—part of the personal or movable property of the testator.

Pausing, therefore, for a moment at this point in the history of the question, the ruling of the authorities may, I think, be summarized in this way:—

Property subject to a general power of appointment exercised by deed or will could be made available for payment of the testator's debts by proceedings instituted in Chancery. It was considered contrary to good faith to permit a power to be exercised in favour of volunteers so as to defeat the creditors of the donee of the power. The Court therefore intercepted the fund—to use the language of Lord Hardwicke, "stopped it in transitu"—and either by regarding the appointee as trustee for the creditors, or by virtue of saying that in the circumstances the creditors had an equity against the fund, caused it to be applied for payment of the debts; but the fund was not any part of the estate of the donee of the power, nor was it anywhere decided that it passed to the executor. It clearly was not regarded as having passed in the statute of 1860, for that legislation proceeded upon the footing that the property was in fact in the hands of the appointee or the trustees of the fund, and they were by the statute compelled to pay over the duty to the executors. It is next urged on behalf of the respondents that certain subsequent cases which show that the executor could give a good receipt for the entire fund are inconsistent with this conclusion.

The first of these is the case of *In re Philbrick's Settlement.* (1) In that case, which is the one often quoted in support of this view, it is quite plain that the Master of the Rolls directed payment by the trustee of the fund to the executor upon the ground that he was an appointee in trust, and not upon the ground that he was simply the executor of a person who had exercised by will a general power. The case related to the will of a married woman, who could only have incurred debts payable out of her separate estate. She had exercised a general power so as to appoint it in part to various persons and settled the remaining part upon her husband for life with certain remainders over, and appointed her husband executor. The judgment of the Master of the Rolls proceeded upon the view that, as she had the power by will to direct that the fund should be transferred to another trustee for the purpose of carrying out such trusts as she had decided to impose upon it, the effect of her will was to create her husband such a trustee, and he was consequently entitled to receive the fund ; and indeed in the earlier part of his judgment he says : "Where the donee of a general power appointed the property to certain persons beneficially, the original trustees were bound to carry the appointment into execution ; but if the donee appointed the property to trustees, those trustees were entitled to receive the property to be held upon the trusts declared by the donee "—a statement entirely inconsistent with the view that the executor qua executor could give a receipt at all.

The next is the case of *Hayes* v. *Oatley* (2), which again was the case of the exercise of a power by a married woman. In that case the fund had been paid over to the executor and by him misappropriated. The terms of the will were not wholly dissimilar from those in *In re Philbrick's Settlement.* (1) The husband of the married woman was appointed sole executor, and certain trusts were declared of the appointed fund. Lord Romilly held that the trustees had received a good discharge from the executor, because if it were not so they, that is, the trustees, would be bound to carry into effect all the limitations of the will. In other words, he again treated the executor as a person whom the testatrix intended to create trustee of the fund for the purpose of carrying out the trusts created by her will. Neither of these cases affects the general question of the right of the

(1) 34 L. J. (Ch.) 368. (2) L. R. 14 Eq. 1.

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executor to give a receipt apart from the special circumstances upon which these cases depend.

The last case is that of *In re Hoskin's Trusts* (1), and that also dealt with the estate of a married woman. The judgment of Malins V.-C. upon the point is not convincing ; but the real value of the case is in the statement made by James L.J. in the Court of Appeal. (2) The facts of the case were strong. Trustees of a fund subject to a general power had refused to hand it over to the executor of the married woman, who was the owner of the power and had executed it by her will. They paid the money into Court, and were held liable for the costs thereby occasioned to the estate upon the ground that they could have got a perfectly good receipt from the executor who had asked for the fund. The merits of this question were never discussed in the Court of Appeal. The appeal was dismissed upon the ground that no appeal lay by the trustees in such circumstances. If by this it was meant that where trustees have been deprived of costs as trustees they cannot appeal against such decision, this authority is not in accordance with the modern practice and authorities. That was, indeed, the only matter for decision, but Sir George Jessel did refer to *In re Philbrick's Settlement* (3) as an authority that would have warranted the trustees in handing over the funds ; and this, as I have pointed out, could only have been the case if the appointee were regarded as the trustee for the new beneficiary. But James L.J. went further and said : " If the merits had to be gone into, I should hold it to be established beyond all question that where a feme covert, or any person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will and appoints an executor, the executor, when he has proved the will, is entitled to receive the appointed fund."

This statement of the learned Lord Justice has been received and acted upon without hesitation from that time onwards, and it has been of inestimable value in obviating litigation and simplifying the administration of estates. It can, however, hardly have referred to a practice known and existing when *In re Philbrick's Settlement* (3) and *Hayes* v. *Oatley* (4) were decided, for had the practice been then established it must have been familiar to the learned judges who

(1) 5 Ch. D. 229.
(2) 6 Ch. D. 281, 283.
(3) 34 L. J. (Ch.) 368.
(4) L. R. 14 Eq. 1.

decided these cases. There is, however, no reference to be found either in the arguments or in the judgments to the existence of such a rule. The practice may have begun to grow in the few years that elapsed between the dates of these decisions and that of *In re Hoskin's Trusts* (1), and thus have supported the very valuable dictum of Sir William James, which seems to be the real foundation of the present practice with regard to the paying over of such moneys. In other words, the rule was made on the ground of convenience, and it was chiefly for this reason that it was extended in the case of *In re Peacock's Settlement* (2) so as to enable payment to an administrator with the will annexed; but, if this be, as I think it is, the true explanation of the present rule, it throws no light on the darkness which surrounds the question as to whether such property passes to the executor as such.

The last argument is based on the contention that property so dealt with becomes legal and not equitable assets of the deceased. In my opinion this argument is of small assistance. If it could be shown by a series of authorities that property of this kind had been treated in the Courts of law as legal assets, it would afford support for the view that notwithstanding the earlier cases to which I have referred the right of the executor to this property was complete, and that it must be regarded as having passed to him as executor. No single authority for this proposition has been quoted before your Lordships, and when it is remembered that the judgment in common law against an executor by a creditor is a judgment de bonis testatoris, and that this House has declared that such property does not form part of the testator's goods, it seems difficult to think that it ever could have been rendered liable at law to the testator's debts; but the matter does not rest entirely upon conjecture. Two authorities—*Cook* v. *Gregson* (3) and *Shee* v. *French* (4)—have established that the test of what assets are legal assets is to be found by considering whether an executor could recover such property by a mere proof of his title on production of the probate. In the case of property passing by the exercise of a general power he clearly could not. It would be necessary to read the contents of the will in order to see that the power had been exercised.

(1) 5 Ch. D. 229; 6 Ch. D. 281.
(2) [1902] 1 Ch. 552.
(3) 3 Drew. 547.
(4) (1857) 3 Drew. 716, 717.

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Having regard, however, to the view taken of these two authorities by Mr. Joshua Williams, by whose opinion the Master of the Rolls was greatly influenced in his decision in *In re Hadley* (1), a case which governed the judgment in the present case, it is well to see exactly what was said in each case. In *Cook* v. *Gregson* (2) the Vice-Chancellor makes the following statement:

"The general proposition is clear enough, that when assets may be made available in a Court of Law, they are legal assets; and when they can only be made available through a Court of Equity, they are equitable assets. This proposition does not, however, refer to the question whether the assets can be recovered by the executor in a Court of Law or in a Court of Equity. The distinction refers to the remedies of the creditor, and not to the nature of the property. The question is not whether the testator's interest was legal or equitable, but whether a creditor of the testator, seeking to get paid out of such assets, can obtain payment thereout from a Court of Law, or can only obtain it through a Court of Equity. This, I apprehend, is the true distinction. If a creditor brings an action at law against the executor, and the executor pleads plene administravit, the truth of the plea must be tried by ascertaining what assets the executor has received, and whatever assets the Court of Law, in trying that question, would charge the executor with, must be regarded as legal assets; all others would be equitable assets.

"Supposing, however, that distinction to be well founded, there still remains the question, what property come to the hands of the executor would a Court of Law consider properly to be taken into account as assets, in trying the truth of the plea of plene administravit. I think the general principle is, that a Court of Law would treat as assets every item of property come to the hands of the executor which he has recovered, or had a right to recover, merely virtute officii, i.e., which he would have had a right to recover if the testator had merely appointed him executor without saying anything about his property or the application thereof. That I think is the test which, upon principle, a Court of Law would apply."

In the later case the same opinion is expressed in these words:

"It having been decided by the Lord Chancellor, that the annuity payable to Mrs. French after her husband's death is assets of

(1) [1909] 1 Ch. 20. (2) 3 Drew. 549.

her husband applicable to the payment of his debts, the only question before me is, whether it is legal or equitable assets. On that point I adhere to the view that I took in *Cook* v. *Gregson*. (1) The question whether assets are legal or equitable depends on this, whether, if the case were before a Court of Law, that Court would treat the property as assets; if it would, then it is legal assets in this Court. And the principle on which a Court of Law proceeds is this,—to inquire whether the property came to the hands of the executor, virtute officii. If it did, the Court of Law regards it as assets of the testator applicable to the payment of his debts, and then this Court treats it as legal assets."

The actual question of what the character of assets constituted by the exercise of a power of appointment may be has never been the subject of controversy until recent time, and before the decision in *In re Hadley* (2) no reference can be obtained to any statement by any judge that these assets were in fact legal, while there are numerous dicta by which eminent judges, beginning in *Pardo* v. *Bingham* (3) with Lord Romilly, and concluding with Lord Lindley in *Beyfus* v. *Lawley* (4), declared them to be equitable. In the case of *In re Hadley* (2) it seems difficult to think that there was any serious controversy upon the question, as the appellant, whose interest it would have been to have contended they were legal, admitted that they were equitable.

The Master of the Rolls, however, whose great authority upon this matter is recognized by all, stated that they were legal assets upon the authority of a quotation from Mr. Joshua Williams's well-known text-book. That statement is to the following effect (p. 13): "There seems little doubt that, according to the principle of the recent decisions, personal estate appointed under a general power would now be considered as legal assets, and distributable among the creditors according to their respective priorities, rather than equitable assets distributable equally. For, although obtained only through the medium of a Court of Equity, it is distributable of right, and forms no part of the bounty of the testator." The recent decisions to which the learned author makes reference are the

(1) 3 Drew. 547.
(2) [1909] 1 Ch. 20.
(3) L. R. 6 Eq. 485.
(4) [1903] A. C. 411.

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cases of *Cook* v. *Gregson* (1) and *Shee* v. *French* (2), but those cases do not respond to his appeal for help, for they only show that where assets vest in an executor virtute officii they are legal assets without regard to what Court the executor would be bound to have recourse to for the assertion of his right, and the case of *Cook* v. *Gregson* (1) distinctly explains that property which vests virtute officii is property which could be recovered by the executor on proof of his appointment, i.e., by production of probate and nothing more. I am not sure that I follow the meaning of the sentence that the property is only obtainable through the medium of a Court of Equity. If by that is meant that a creditor could only so obtain it, as is in my opinion the fact, this would constitute them equitable assets, and not legal. If, on the other hand (and this is the more probable meaning), it meant that the executor could so recover them, it was not because they had passed to him qua executor or virtute officii, but upon the ground that he was asserting on behalf of creditors an equity which the Courts would recognize on their behalf.

The concluding statement of the learned author, that the property vests in the executor by virtue of his office, is contrary to the test explained in *Cook* v. *Gregson* (1) and in *Shee* v. *French* (2), and approved in this House in the case of *Attorney-General* v. *Brunning*. (3)

In my opinion it was rightly decided that the test of legal and equitable assets depends upon the forum to which the creditor must have resort, and as he could not obtain these assets by an action at law, I fail to see how they can be regarded as otherwise than equitable assets.

I may add that no other text-book can be quoted as supporting the view of the eminent authority of Mr. Joshua Williams's book, and the books on Chancery practice have treated the property as distributable on equitable principles (see Daniell's Chancery Practice, 6th ed., p. 1046, though this part of the note has been omitted in the 7th edition). It has been impossible to do justice to the arguments of counsel, or to examine the foundation of some of the judgments that have been delivered upon the point raised in this appeal, without this investigation of authority; but the

(1) 3 Drew. 547. (2) 3 Drew. 716.
(3) 8 H. L. C. 243.

result has rather a negative than a positive value in determining what is meant in s. 9, sub-s. 1, of the Finance Act of 1894. I think it may well be that considerations of the quality of assets did not enter into the mind of the draftsman of that statute or of the Legislature when the Act was passed, nor does it appear to me material, since, as I have already said, this consideration could only be critical on one view, and that has not been established. But one thing at least your Lordships are bound to consider in determining what this Act intended to effect, and that is the way in which the law stood before it was passed, and the object, as gathered from the language of the statute, which it was designed to achieve.

Now the purpose of the Act was to create an extended form of duty leviable on death, a duty which should embrace, and extend far beyond, the existing duties which it was intended to supersede. It was designed to raise revenue: it is no necessary part of such a purpose to alter as between different classes of beneficial interests the burdens imposed by statute in respect of the duties which were absorbed. In many cases the estate duty would simply be substituted for probate duty. In all cases of personal estate, and in all cases where, in addition to the personal estate, there was a power over personal property exercised by will, apart from varying the amount of the duty and the introduction of the system of a rateable assessment, the new duty would take the place of the old. The contention of the respondents must be that in those circumstances the Act deliberately designs to shift a burden which had been carefully adjusted by statute and in operation for thirty-four years. Nor would such readjustment assist or facilitate the Revenue in the collection of duty. The primary duty of payment was imposed upon the executor in respect of this property. If, therefore, the incidence was changed, it must be for a collateral purpose of the Act of Parliament, and not to secure and render firm its main provisions. I do not propose to restate what has so often been enunciated in this House as to the scheme of this statute or the means it adopts for carrying such scheme into effect, but s. 8 and s. 9 do demand some critical examination. Sect. 8 by sub-ss. 3 and 4 distributes the liability to account for property subject to duty between the executor and the beneficiaries or their trustees. The executor is accountable for all personal property of which the

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deceased was competent to dispose, and by sub-s. 4 in all other cases the beneficiary or trustee is the accountable party. Personal liability for payment is in actual terms only made to attach to the executor. It is established in s. 6 and referred to again in s. 8, sub-s. 3, where such liability is limited to the assets he has, or but for his wilful default could have, received. Personal property, therefore, over which the testator had enjoyed a general power of appointment which he had not exercised would be property for which the executor, and not the beneficiary or his trustee, would be accountable, and which, to the extent mentioned in s. 8, sub-s. 3, the executor would be liable to pay, but in the event of the executor having insufficient assets for the payment of the duty, no personal liability would exist in respect of such duty, and the Revenue would be compelled to have recourse to s. 9 in order to obtain its recovery.

The case of *In re Fearnsides* (1), where Swinfen Eady L.J. (then Swinfen Eady J.) decided that the appointed property did pass to the executor, appears to me to have been founded on a misapprehension of these provisions of the statute. The learned judge says that the contrary view would involve this difficulty, that "an executor who received the appointed funds would be 'accountable' for the estate duty, but yet not 'liable,' as the assets would not be received by him as executor; and the person to whom the property passed for a beneficial interest in possession would not be liable for the duty by sub-s. 4 of s. 8, because the executor would be 'accountable.'" The learned judge assumes that the fact that persons are made accountable under the statute is the same thing as rendering them liable to pay. It is not necessary to decide whether this view be right, but, even on the assumption that it is, the difficulty pointed out by the learned judge would equally arise in respect of personal property subject to a general power which had not been exercised. In that case also the executor would be accountable; equally also the person to whom the property passed for a beneficial interest in possession would not be accountable. The executor would not be liable if he had no assets sufficient for payment; and, unless the property is charged under s. 9, sub-s.1, as it undoubtedly is, the duty would not be recoverable.

The weight of the learned judge's observations, however, no

(1) [1903] 1 Ch. 250, 257.

doubt depends upon the assumption that the executor having received part of the appointed fund has had assets for the payment of the duty, but so also he would have received assets for payment in respect of an unappointed fund of personal estate, if the personal estate of which the deceased was possessed was sufficient to allow payment of the duties.

There is nothing in the Act of Parliament which confines the fund available for payment of duty in respect of appointed personalty to the appointed fund itself. The executor's liability is limited only by the assets of the estate received by him from any source.

In my opinion the true function of s. 9 is to apportion the burden as between the various items of property on which the whole duty is payable by freeing the property which passes to the executor as such and charging the property which does not. If it passes to the executor as such, his liability under s. 6 and s. 8, sub-s. 3, is complete. If it does not, the beneficiaries or the executor, as the case may be, have to render an account; the executor, if the property be personal estate of which the deceased was competent to dispose and if he has assets sufficient to pay, must pay, but, whether he has assets or no, whether he accounts or other people, in any event the property is liable. I do not think that property which passes to the executor as such is necessarily the same as property received by the executor as executor or which he might, but for his wilful default, have received. Sect. 9, sub-s. 1, deals with the actual transition of the estate, and the words " as such " are in my opinion equivalent either to the phrase " qua executor " or " virtute officii," and in neither of these capacities does personal property subject to an exercised power by will pass to the executor, if it passes at all.

It is unnecessary to discuss in detail the principles which underlie the other decisions that have been given since the passing of the Finance Act of 1894. They present an unusual conflict of opinion among judges of co-ordinate jurisdiction, but it follows from what I have said that in my opinion the right conclusion was reached by Kekewich J. in *In re Treasure* (1), by Byrne J. in *In re Power* (2), by Warrington L.J. (then Warrington J.) in *In re Dodson* (3), and by Lord Parker (then Parker J.) in *In re Hadley*. (4)

(1) [1900] 2 Ch. 648.
(2) [1901] 2 Ch. 659.
(3) [1907] 1 Ch. 284.
(4) [1909] 1 Ch. 20.

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There remains only the question of whether this duty forms part of testamentary expenses as the phrase is used in the will of the testatrix. In my opinion it does not. In this will the phrase "funeral and testamentary expenses, debts, and legacies" does no more than repeat in words, by way of definition, the list of payments which must in due course of administration be made out of residue before the residuary legatee can take the balance. If duty on an appointed fund formed part of the testamentary expenses, so also would the duty on a fund subject to a general power which had not been exercised. I think Joyce J. was right in the case of *Porte* v. *Williams* (1) in deciding that this duty was not included, though I do not agree with the distinction which he draws between the duty on the appointed and the unappointed fund. It follows that in my opinion the judgment of the Court of Appeal was wrong, and that the judgment of Eve J. was right in the result but wrong in proceeding upon the view that the property subject to the power of appointment was liable to duty as real estate. I think, therefore, that this appeal should succeed, but, having regard to the previous uncertainty of the law and the great variety of judicial opinion, I think that the right order as to costs is to make them payable out of the appointed property.

LORD ATKINSON. My Lords, I concur.

The first, and the main, question arising for decision in this case turns on the consturction of s. 9, sub-s. 1, of the Finance Act of 1894. It resolves itself into this : Does personal estate over which a person has a general power of appointment by will which he or she can lawfully execute in favour of himself or herself, and which he or she in fact executes by will in favour of certain appointees, pass to his or her executor "as such" within the meaning of this sub-section.

It was decided by the Court of Appeal in *In re Hadley* (2) that where the appointed property was personal property it did so pass ; that the estate duty payable in respect of it was not a charge upon it, but was payable out of the testator's personal estate, properly so called, so that this appeal is, in effect, an appeal from that decision. Few questions have given rise to a more marked difference of judicial opinion, and it is undoubtedly a question of some difficulty. In the

(1) [1911] 1 Ch. 188. (2) [1909] 1 Ch. 20.

interpretation of statutes, one of the matters which, according to Lord Coke, it is proper to consider, in order to arrive at their true meaning, is the state of the law before they passed: *Heydon's Case.* (1) Again, Lord Blackburn, in the case of *River Wear Navigation Commissioners* v. *Adamson* (2), lays down the principles upon which Courts of law proceed in the construction of statutes, in these words: "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used." Lord Halsbury quotes that passage with approval in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks.* (3) Now the 55 Geo. 3, c. 184, s. 38, provides for probate or letters of administration being granted in or of the estate and effects of a deceased person exclusive of what the deceased shall be entitled to as a trustee for any other person or persons and not beneficially, and imposes a stamp duty on the probate or letters of administration varying with the value of those estates and effects according to the scale set forth in the schedule to the Act. In the case of *Drake* v. *Attorney-General* (4) it was decided that personal property over which a testatrix had a general power of appointment was not her own estate and effects so as to be liable to probate duty. That is a decision of the very highest authority. The Lord Chancellor, Lord Lyndhurst, and Lord Cottenham were amongst the noble Lords who took part in it, and they were supported by the unanimous opinion of nine most distinguished judges. Probate or letters of administration, therefore, per se, as they only conferred upon an executor or administrator the right to possess himself of and deal with the estate and effects of the deceased within the jurisdiction of the Court granting those documents, did not touch or affect property so appointed. That property does not pass to either of

(1) (1584) 3 Rep. 7a; cp. 10 Rep. 73a.
(2) (1877) 2 App. Cas. 743, 763.
(3) [1898] A. C. 571, 576.
(4) 10 Cl. & F. 257.

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them as the representative of the deceased. But, though not the property of the testator, the property appointed under such a power becomes, in certain events, liable to be applied to the payment of the testator's debts, next after his own real and personal property has been so applied. If no appointment be made, the property subject to the power could not be so applied. It would then pass to those entitled to it in default of appointment to be held for their own benefit.

All personal property which an executor, by virtue of the probate, can, in whatever form, recover, either through the agency of a Court of Law or of a Court of Equity, forms part of the estate and effects of the deceased, and is therefore liable to probate duty. In *Attorney-General* v. *Brunning* (1) it was for that reason held that the unpaid purchase-money of real estate contracted to be sold by the deceased, but not, in fact, conveyed to the purchaser, formed part of his estate and effects, and was therefore legal assets, as they are styled. But it had been already decided in *Drake* v. *Attorney-General* (2) that property appointed by a testator under such a general power was not part of his estate and effects and is therefore not legal assets at all, but, as it is styled, equitable assets. Lord Cranworth said (3): "With all deference to the Court of Exchequer, I think that Court fell into error in treating this money as being equitable assets. It is a sum which the executor would take as executor, and which, therefore, would be legal assets in his hands. His right would not depend on anything contained in the will of Mr. Hope. Mr. Hope's administrator would have been entitled in case he had died intestate; and what an administrator is entitled to recover as administrator, virtute officii, can never be equitable assets. In considering whether assets are legal or equitable, the question is not whether the money is recoverable through the agency of a Court of Equity or the agency of a Court of Law, but whether it is money which the personal representative is entitled to recover independently of any directions of the testator. The portions of younger children charged on the family estate are generally only recoverable in equity, but they are certainly legal, not equitable assets. So money due to a mortgagee in fee, where the mortgagee is not a creditor by covenant

(1) 8 H. L. C. 243. (2) 10 Cl. & F. 257.
(3) 8 H. L. C. 258.

or otherwise, and where, therefore, there is no legal remedy. And instances might be multiplied indefinitely." Lord Wensleydale expressed himself to the same effect.

And Lord Chelmsford (1) approved of the test laid down by Kindersley V.-C. in *Cook* v. *Gregson* (2) as to the difference between legal and equitable assets, to the effect that the question is not whether the testator's interest was legal or equitable, but whether a creditor of the testator seeking to get paid out of such assets can obtain payment therefrom only through a Court of Equity. The Vice-Chancellor then proceeds: "Supposing, however, that distinction to be well founded, there still remains the question, what property coming to the hands of the executors would a Court of Law consider property to be taken into account as assets, in trying the truth of a plea of plene administravit. I think the general rule is that a Court of Law would treat as assets every item of property come to the hands of the executor which he had recovered, or had a right to recover, merely virtute officii, i.e. which he would have a right to recover if the testator had merely appointed him executor without saying anything about his property or the application thereof." This clearly excludes personal property appointed by will under a general power, since it is the exercise of the power by the will, not the mere appointment of the executor, that makes the land assets.

Hence, as is admitted, if no appointment be made, those entitled in default of appointment hold the property subject to the power for their own benefit. The executor or administrator could not interfere with it. In *Fleming* v. *Buchanan* (3), decided in 1853, the property which the testator had power to appoint was freehold. Turner L.J. said (4): "The debts it would seem ought to be paid out of the property of the testator. His personal estate is primarily liable for the payment of them, but personal estate over which he has merely a power is not his personal estate. Property, whether personal or real, over which a testator has a general power is liable for his debts—as to the personal estate for all his debts, and as to the real estate at all events for his specialty debts, but such property is not the personal or real estate of the testator. . . . . I think therefore that the personal estate, and the real estate, including

(1) 8 H. L. C. 265.
(2) 3 Drew. 547.
(3) 3 D. M. & G. 976.
(4) 3 D. M. & G. 979.

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property specifically devised or bequeathed, must be applied before the appointed estate." He ultimately comes to the conclusion that the appointed realty is available to pay simple contract debts. Knight Bruce L.J. said (1): "On whatever grounds it was originally so held, it is and has for a long time been the settled law of the country, that if a man having a power, and a power only, over personal estate to appoint it as he will, exercises the power by a testamentary appointment, the property becomes subject in a certain order and manner to the payment of his debts, whatever may be the intention or absence of intention upon his part. Not only in point of principle and reason, but of precedent and authority, I apprehend the same rule applies to real estate, where it is subject to a general power exercised by will. . . . . I always considered it clear, and the authorities confirm me in the opinion, that resort is to be had to property of that description only in favour of the creditors, to prevent their being unpaid; and therefore that such property should not be resorted to until all the testator's estate in a more accurate sense of the word, has been exhausted in payment of debts. That I take to be the rule, and the course of administration. Specific legatees must if necessary suffer, as well as every other claimant of an interest in property which is strictly the testator's." He then holds that the appointed realty is liable to simple contract debts. In *Beyfus* v. *Lawley* (2) the decision in this case was approved of by this House, and the judgments of Lord Halsbury and Lord Macnaghten are expressly based upon this passage in the judgment of Knight Bruce L.J. I do not think the judgment of the third noble Lord who took part in the case, Lord Lindley, when properly understood, differs in any way from the judgment of the majority. At all events, the judgment of the majority prevails. It is the judgment of this House, and by means of it the decision of Knight Bruce L.J. becomes practically a decision of this House, finally determining what the law really is on the points the subject of decision. In the great conflict of authority I prefer to rest my judgment as far as possible on the decisions of this House because of their final and conclusive character. According to the law as determined by them: 1. Property, whether real or personal, appointed under a general power is not and does not

(1) 3 D. M. & G. 980. (2) [1903] A. C. 411.

become the property of the deceased. 2. It never passes to or becomes vested in the executor or administrator by virtue of the probate or letters of administration with will annexed per se. 3. In no Court of Law or Equity do these documents alone entitle the one or the other to recover any portion of the appointed property. It is the clause in the will plus the probate or letters of administration with will annexed which give to the executor or administrator any claim either may have upon the appointed property. That property is therefore not legal assets.

Up to the year 1860 probate duty was never paid upon personal property so appointed, for the very good reason that it never had been the property of the testator. It seems to me impossible to doubt that up to that year it must have been held that no portion of such property, whether real or personal, passed either to the executor or administrator as such—that is, in their representative character. The Act of 1860 (23 & 24 Vict. c. 15), s. 4, levied probate duty on personal property so appointed, and that whether the estate of the deceased was solvent or not, and even before it was ascertained whether or not there would be any need to resort to the appointed fund for the payment of his debts. Its language is peculiar. It does not convert the personalty appointed under a general power into assets of the deceased, but merely enacts that, for the purpose of that Act, it is to be deemed to be the personal estate and effects of the person exercising the power. The purposes of the Act are the levying of the duty and, as ancillary to that, the inclusion of this property in the affidavit of the person applying for probate or letters of administration with will annexed, in order that the full and proper stamp duty may be paid. It is not one of the objects of the Act to vest this property in the executor or administrator for the purpose of paying creditors, and the appointed property is not therefore deemed to be the personal estate and effects of the testator for that purpose. In *Hill* v. *East and West India Dock Co.* (1) Lord Cairns and Lord Blackburn deal with the proper construction of the clause of a statute which provides that a particular thing shall be deemed to be something which in fact it is not. Both approve of the judgment of James L.J. in *Ex parte Walton* (2) and

(1) (1884) 9 App. Cas. 448, 455, 458.

(2) (1881) 17 Ch. D. 746, 756.

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hold that the statutory fiction should, if the context permit, only be given effect to so far as is necessary to effectuate the purposes of the particular Act and no further.

The succeeding section of the statute of 1860 shows clearly that these assets were not to be taken to be the assets of the testator in the true sense, else the probate duty paid in respect of them would primarily fall on the residue as a testamentary expense; but the probate duties paid in respect of the appointed property is made a charge or burden on that property itself, and must be paid out of it by the trustees or owners of it to the executor or administrator, for the benefit of the persons entitled to the personal estate and effects of the deceased. In my view, therefore, this statute, imposing probate duty upon personalty appointed under a general power, and providing thus for its collection, yet enacting that the duty shall ultimately be paid out of that personalty itself, leaves the law touching such property in other respects precisely as it was before the statute passed. Different theories were put forward in argument as to the principle upon which this branch of the law is based. It would appear to me that as near the truth as any is the theory that equity and good conscience require that a donee of such a power must be just before he is generous, and that as he could appoint the property to himself, making it thereby his own assets available to satisfy his debts, his appointees should be held to hold it in trust for his creditors to the extent that the donee's own property may be found to be insufficient to satisfy their claims, the donee's generosity being defeated only so far as justice to his creditors requires.

Your Lordships were not referred to any statute passed during the thirty-four years which separate the Act of 1860 from the Finance Act of 1894 altering the former position of things. But it was contended that this latter statute changed everything fundamentally—appointed personalty, if indeed not appointed realty, becoming for the first time legal assets, and on the death of the testator passing to his executor or administrator in their respective representative characters, and that the estate duty leviable in respect of it, which must be paid before probate or letters of administration, with will annexed, can be obtained, and therefore possibly before it can be ascertained whether or not any of this

appointed personalty will be ever required to satisfy the donee's creditors, fell not upon the appointed fund itself, but upon the residuary estate of the testator, or upon the general body of the assets, including the appointed fund. I did not gather that it was contended that there was any provision in the Act of 1894 which expressly and directly enacted that the former condition of things should be so altered. With all respect to the Court of Appeal, I am unable to find anything in the Finance Act which turns appointed personalty, or appointed realty, from equitable into legal assets. It is still the provision contained in the will of the donee of the power, or in his deed if the appointment be made by deed, as it may be, not the probate per se, nor the letters of administration, with will annexed, per se, which gives the executor or administrator any claim to or right over this appointed personalty.

I concur in the opinion expressed by Byrne J. in *In re Power* (1) as to the true meaning of the opinion expressed by James L.J. in *In re Hoskin's Trusts.* (2) The 38th section of the 55 Geo. 3, c. 184, is expressly repealed in the Second Schedule of the Finance Act. By s. 8 of the latter the Act of 1860 is, I assume, impliedly repealed, so far as it is inconsistent with the Act of 1894.

The words " property passing at the death of the deceased " cover many kinds of property. The executor (in the wide meaning given to that word by the definition clause, s. 22) is, under s. 6, sub-s. 2, bound to pay estate duty on many kinds of property to which he has no title, and over which he may never have any right, direct or indirect, such as property which the testator could have disposed of under a power general or special, but of which he never in fact did dispose ; or property situate abroad, which he cannot interfere with unless he procures a local probate. It was not, and could not, I think, be contended that the property passing in default of appointment ever passed to the executor or became vested in him. The estate duty becomes due on the delivery of the account mentioned in s. 6, sub-s. 2, or of the account mentioned in sub-s. 4, at the date of delivery or six months after testator's death, whichever shall first happen. It is obvious that it may not be then known whether or not the appointed property may ever have to be resorted to to the extent of one shilling to pay the testator's debts.

(1) [1901] 2 Ch. 659, 665. (2) 6 Ch. D. 281, 283.

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If this appointed personalty passes to the executor, when does it pass? After it has been ascertained that it will be required in whole or in part to pay the testator's debts, his own proper assets being insufficient, or, on the testator's death, subject to the contingency that it is to pass from him to the appointees as soon as it is discovered that it will not be resorted to. There is not a suggestion in the Act or in any authority which has been cited that the consent of the executors is required to vest in an appointee the share of the fund appointed to him, such as is required in the case of a legacy. Again, the executor is bound (s. 6, sub-s. 2) to include in his account attached to the Inland Revenue affidavit the appointed realty, or the realty which might have been appointed and has not been, but has gone to those entitled in default of appointment. By s. 8, sub-s. 3, he is not bound to account for, or to pay the duty upon, this realty, though if appointed it, or the proceeds of it, might be required to pay the testator's debts. The duty due upon it is in either case to be charged upon and paid out of the thing itself (s. 6, sub-ss. 4, 5, 6, 7). It is not suggested that the appointed realty passes to the executor. And upon what principle the duty upon appointed realty is to be levied upon the realty itself, and that upon the appointed personalty is to be paid out of the residuary estate of the testator, though the realty and personalty are both liable to the payment of his debts, passes my comprehension. If the language of the statute is so imperative as to necessitate a result so unjust and irrational, of course its words must be obeyed. I do not think its language is of that coercive character. I think s. 9, sub-s. 1, was designed to prevent such a result. Just as the 4th section of the Act of 1860 required the executors to pay the probate duty in the first instance on appointed personalty, and by s. 5 charged that fund with the duty paid in respect of it, so s. 9, sub-s. 1, was, I think, introduced to secure that the duty paid by the executors on all the different kinds of personal property upon which he might pay it (there are several of these), other than that kind which his probate per se entitled him to possess himself of, or to recover by process of law, was to be charged upon each different kind of property in respect of which it was respectively paid. The principle which underlies ss. 4 and 5 of the Act of 1860 underlies equally, I think, s. 6, sub-s. 1, and s. 9, sub-s. 1, of the Act of 1894, though, of course,

the latter has a wider range. There is no indication that it ever was intended by the Act to alter the whole incidence of a duty which includes, and in this case represents, probate duty. I think this appointed personalty never passed to the executors virtute officii in the sense above mentioned, and that upon this point the appeal succeeds.

The second point is that, even if this be so, the direction by the testatrix that her debts and funeral and testamentary expenses should be paid throws the estate duty on to the residue, on the ground that the payment of that duty on personalty is a testamentary expense, since probate of the will cannot be obtained unless and until it is paid. If the estate duty to be paid as a condition precedent to the obtaining of probate were confined to probate duty alone, there might be much in this argument, but it is not so confined. It extends to personal property which might be appointed by the testator under a general or special power, whether in fact it was appointed or not. It also extends to property situate abroad, with which the probate gives no right to interfere, probate in the foreign country in which it happens to be situate being necessary for that purpose. That clause in the will, which is in the common form, does not, I think, enlarge the powers which the executor would have at law independently of it. I do not think the clause can be extended to cover estate duty on personalty in the wide meaning given to it by s. 6, sub-s. 2, of the Act of 1894. The fact that in this particular case a duty which it is said only represents probate duty is alone sought to be covered by it cannot alter the construction of the clause. I think the contention fails. It was strongly urged that the real estate vested in trustees in trust for sale must be taken for the purposes of this case to be reconverted into realty by the provisions contained in the will of the testatrix. In the view I have formed upon the other points of the case it is unnecessary for me to deal at length with this point beyond expressing my concurrence in the opinion which the Lord Chancellor has expressed. I approve of the order he has suggested.

LORD SUMNER. My Lords, the subject of the appointment in question is in fact land in Northumberland. Down to the date of the will in equity it was not land but personalty. It is said that by

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force of her will the testatrix reconverted it into land; preferably when she made her will; alternatively when she died. Assuming that the will sufficiently expressed an intention to reconvert, I do not see how it could have any effect in her lifetime. Much the same point was made in *Jenney* v. *Andrews* (1) and failed. The instrument was a will all the time, and nothing else, and so was inoperative till the testatrix died. Further, the argument is that a reconversion was effected on her death, and if that can be made out the appeal succeeds. What the contention involves is this. As the testatrix passed away her will took effect. Accordingly, this property, then being personalty, passed in some sense or other to her executor, but in the same moment of time changed into realty and did not pass to him at all. I do not know how the passage of the fund from personalty into realty is to precede its passage as personalty into the executor, or how passage into the executor and not into the executor can simultaneously co-exist. No decision was cited to show how it is done; so I think, so far, the decision of the Court of Appeal was right. *In re Lord Grimthorpe* (2) does not seem to be in point.

Next, the question is whether the property passed to the executor "as such" within s. 9, sub-s. 1, of the Finance Act, 1894. This turns on the construction of the language of the section. I take it first, apart from the cases.

That the property would not pass to the executor, in the sense of vesting in him, is settled law. *Drake* v. *Attorney-General* (3), affirming Lord Langdale M.R. (4) and approving *Platt* v. *Routh* (5), so decides. The interlocutory remark of Lord Lyndhurst L.C.—"the executor takes nothing in the property appointed"—is the gist of the decision. "Passes," however, may have a wider sense than "vests"; it is so under the earlier sections of this very Act. It is agreed on all hands that the subject of the power in question passes to the executor somehow: the question is how? Does it pass to him "as such"? I suppose "as such" means "as executor," "in the character or office of executor," and not in any other character, as, for example, as heir-at-law, reversioner, legatee, or

(1) 6 Madd. 264.
(2) [1908] 2 Ch. 675.
(3) 10 Cl. & F. 257, 286.
(4) 3 Beav. 257.
(5) 6 M. & W. 756.

trustee. Here the alternative suggested to as executor is as trustee. The case would be simple if " executor " in s. 9, sub-s. 1, could be a residuary word, so that the sub-section meant passes to the person who happens to be executor, and not in any capacity known to the law distinct from executorship, such as that of heir-at-law, reversioner, legatee, or trustee. It is, however, actually used as a specific expression. The question is, " Can it be affirmed of the subject of the power that it passed to the executor as executor ? " not, " Can it be denied of it that it passed to him as anything else ? " It therefore becomes necessary to consider the expression " as such " somewhat closely.

Two short cuts have been offered to your Lordships. Each has the attraction of all short cuts. It makes an end of the case. First, it is said that the phrase is ambiguous, and that the ambiguity may be resolved by observing that probate duty before 1894 would have been a charge on the subject of this power, that estate duty replaces probate duty, and that the Legislature could not have meant to alter the incidence of the duty, though its character and operation were enlarged. If so, the appellant succeeds. Again, it is said that the phrase employed by the Legislature had a well-known technical meaning. It connoted the distinction between legal and equitable assets : hence it brought within the exception legal assets only ; and thus also the appellant succeeds.

My Lords, neither argument seems satisfactory. I agree that the Legislature did not mean to make the incidence of estate duty in this connection different from that of probate duty. To do so could not benefit the Revenue, and was certain to cause trouble. The mere substitution of estate duty for probate duty necessitates no such change. I do not, however, think that the language is ambiguous. The difference of judicial opinion as to its effect on the case of a general testamentary power of appointment is great, but what is really obscure is the exact relation of the executor in such a case to the subject of the power. When that is decided the effect of the sub-section is reasonably plain.

Again, I accept that " passes to the executor as such " was and is a phrase by which learned persons would commonly describe the test for distinguishing between legal and equitable assets. It is not, however, a technical expression in the sense that by its use the

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Legislature ought to be taken to have pointed to that distinction and to no other. The phrase, I believe, is to be found in no statute or reported judgment, and only in one reported argument—*Cook* v. *Gregson*. (1) The Legislature has not used one of those Latin tags by which rules of law are earmarked, such as qua executor, virtute officii, or jure representationis. Why did it not use the language of the Act of 1860, or say " excepting legal assets " ? I wish it had. As the Act does not adopt the language of the Act of 1860, but employs other language which has not acquired technical connotation, I fear we cannot escape the question, " How and in what sense does the subject of a general testamentary power pass to an executor on the effectual exercise of the power ? "

The rule first appears in the seventeenth century. It takes shape in the middle of the eighteenth. In *Lord Townshend* v. *Windham* (2) Lord Hardwicke says that the Courts " stop in transitu, as it is called," and he appears to have accepted in *Troughton* v. *Troughton* (3) the expression " the Court ought to intercept it for the benefit of a creditor." The rule arose out of tenderness for creditors. " It would be a strange thing if volunteers . . . . should run away with the whole, and that creditors for a valuable consideration should sit down by the loss without any relief in this Court " : *Bainton* v. *Ward* (4), afterwards affirmed in the House of Lords : see *Lassells* v. *Lord Cornwallis*. (5) Since the right to exercise a power is not property, equity, regardless of the facts, assumed that a man in debt, who might have used the power to pay his debts, could not really mean to exercise it so as to benefit a volunteer and leave his debts unpaid. Fundamentally this has nothing to do with executorship, for, provided a Court of Equity sees that the creditors are paid out of the subject of the power, if need be, the executor's position is at most ministerial. He may be no more than a necessary party. The theory of the executor's position has been developed in various ways since Lord Hardwicke's time, but the theories are so discordant that, with all humility, I think them confusing. The rule now is that the trustees of the fund are bound to pay it over to the executor whether the appointor's estate is indebted or not, and by doing so

(1) 3 Drew. 547.
(2) 2 Ves. Sen. 1, 11.
(3) 3 Atk. 656.
(4) 2 Atk. 172.
(5) 2 Vern. 465.

they discharge themselves (*Hayes* v. *Oatley* (1); *In re Hoskin's Trusts* (2)). This is said (*In re Hadley* (3)) to be by reason of the probate and because the payee is executor. By exercising the power the testator has been thought to make the subject of the power his own and part of his assets; hence the executor is entitled. Having received the fund, the executor is, no doubt, accountable, and this consideration apparently led to the opinion, expressed in *Hadley's Case* (3), that a fund of personalty appointed by will under a general power must be classed as legal assets. The authorities do not seem to have been cited on that occasion, and the point is one which has long been of diminishing importance. In the proper sense of the words I do not think that this opinion can be regarded as correct. I cannot find that evidence of receipt of such a fund has ever been admitted where, in an action at law by a creditor, an executor has pleaded plene administravit, and issue has been joined thereon, or that an executor has ever been allowed to exercise his right of retainer against it. The rule is a rule of equity and applies to realty as well as to personalty, while an executor holds a common law office and at common law did not take the realty of his testator. Mr. Joshua Williams thought that the fund vested in the executor, which is inconsistent with the decision in *Drake* v. *Attorney-General.* (4) Again it was contended (per Wilde S.-G., arguendo) in *Platt* v. *Routh* (5) that equity by implication makes the donee of the power a trustee for his creditors, if he exercises the power at all. This suggestion seems to have gone no further. Leach V.-C. in *Jenney* v. *Andrews* (6) said that the appointee was trustee for the creditors. What in the report of that case seems to have been only a dictum is converted by Romilly M.R. into a decision in *Williams* v. *Lomas.* (7) Nevertheless it is the executor who gets the money and pays the creditors. The appointee does not; he takes what the executor has left, and keeps it. The now appellant's argument is, following the view which Kekewich J. (*In re Treasure* (8)) took of *In re Philbrick's Settlement* (9), as extended by the language of James L.J. in *In re*

(1) L. R. 14 Eq. 1.
(2) 5 Ch. D. 229; 6 Ch. D. 281.
(3) [1909] 1 Ch. 20, 30.
(4) 10 Cl. & F. 257.
(5) 6 M. & W. 756.
(6) 6 Madd. 264.
(7) 16 Beav. 1.
(8) [1900] 2 Ch. 648.
(9) 34 L. J. (Ch.) 368.

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Hoskin's Trusts (1), that the executor becomes a trustee of the fund for the creditors, but, as Buckley J. points out (*In re Moore* (2)), he only becomes trustee, in the sense of trustee of the fund for the appointees, subject to "another duty which the trustee of the fund had not, namely, the duty before he hands anything to the appointees to take the whole fund, or as much as is necessary to satisfy the debts of his testator." In truth, as nobody appointed the executor a trustee, as the original trustees of the settlement remain such till they have got rid of the money by paying it to him, and as the whole intention of the appointor was to appoint so as to pass his creditors by, I think this theory is only an attempt to state the working rule of administration in terms of a particular and inapplicable category of equity. On the other hand the executor has been said to be an appointee of the fund himself. Here, too, I think the same observation may be made. His relation to the appointed fund has become defined in a series of cases, sometimes casually and sometimes anomalously. He is the proper person to receive it; he ought to apply it, so far as may be necessary, in due order of administration, and in a Court of Equity is accountable and compellable to do so. Clearly he is entitled to possession of it and is bound to administer it in the course of his executorship. I think that is really all. Be the theory what it may, surely this relation to the appointed fund cannot be correctly described as a passing to the executor as such. It never became bona testatoris in any real sense; before the will spoke the testator was dead, and till the will spoke there was no appointment. The distinction between a will as a testamentary disposition of property naming an executor as the legal personal representative of the deceased, on the one hand, and a will as a prescribed mode of exercising a power with an executor named therein only to effectuate the appointment, on the other, is illustrated by *Tugman* v. *Hopkins* (3), and see *In re Tomlinson*. (4) What makes him executor, entitled to what had belonged to the testator in his lifetime, is the testamentary disposition, which appoints him. What makes him recipient of the appointed fund and administrator of it is the control which Courts of Equity have exercised over funds which did not belong to

(1) 6 Ch. D. 281, 283.
(2) [1901] 1 Ch. 691, 695.
(3) 4 Man. & G. 389.
(4) (1881) 6 P. D. 209.

the testator in his lifetime, and to which the will gives the executor no title at all. I think that Lord Hardwicke's language, that equity intercepts the fund or stops it in transitu, is much the clearest guide, and sufficiently explains what is a rule rather than a principle. There is high authority for this view. "In favour of creditors," says Lord Thurlow (*Harrington* v. *Harte* (1)), "this Court would arrest the fund in transitu." "A rule of equity," says Lord Abinger, "subjects a fund so appointed to the debts of the appointor": *Platt* v. *Routh*. (2) It is "considered as part of the estate of the testator at the time of his death": *Lord Townshend* v. *Windham*. (3) It is "considered as assets, if wanted": Grant M.R. in *Daubeney* v. *Cockburn* (4); and "the Court will for creditors lay hold of the money when it is appointed for a volunteer": *Holmes* v. *Coghill*. (5) "Such property is not the personal or real estate of the testator": Turner L.J.; it is resorted to in aid of "the testator's estate in a more accurate sense of the word": Knight Bruce L.J. (both in *Fleming* v. *Buchanan* (6)). It is "treated as personal estate bequeathed by the testator": Lord Lindley in *Beyfus* v. *Lawley*. (7) By thus "considering" and "treating" it as what, "in a more accurate sense," it is not, the executor is made the recipient of the fund. It is only by the will that property passes to the executor as such.

The words of s. 8, sub-s. 3, "shall not be liable for any duty in excess of the assets which he has received as executor," have been thought to assist in the interpretation of the words in s. 9, sub-s. 1, "pass to the executor as such." The two sections are not in pari materia. In the former all estate duty is payable, and only payable, out of estate assets, default apart, no matter whence or how they become such. In the latter, part of the estate duty is chargeable on part of the assets and on that part only, and what makes the distinction is the source from which the part comes and the mode in which it becomes assets. Clearly in s. 8, sub-s. 3, "as executor" is in contradistinction to otherwise than as executor, and covers all an executor's receipts; in s. 9, sub-s. 1, whatever "passes to the

(1) 1 Cox, 131.
(2) 6 M. & W. 756, 789.
(3) 2 Ves. Sen. 1, 11.
(4) 1 Mer. 626, 639.
(5) 7 Ves. 499, 508.
(6) 3 D. M. & G. 976, 979, 981.
(7) [1903] A. C. 411, 413.

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executor as such " is in contradistinction to what passes to him, but not in his character as executor, though still being assets for which he is accountable, and is or may be only a part of the executor's receipts. Hence I think s. 8, sub-s. 3, leaves the problem which arises in s. 9, sub-s. 1, just where it was. The executor is " accountable for the estate duty in respect of all personal property of which the deceased was competent to dispose at his death " (s. 8, sub-s. 3), a description which covers the appointed fund, and (s. 1) that fund is included in the property on which estate duty is leviable. That property may exceed the limits of the assets, which can ever come to the executor's hands, or of the estate of the testator properly so called. Sect. 8, sub-s. 3, limits the liability of the executor to pay the estate duty without distinguishing the different components of the taxable aggregate; s. 9, sub-s. 1, provides for passing on part of that estate duty, if paid, according as it is payable in respect of one component of the whole or another. I do not think that the dilemma suggested by Eady J. in *In re Fearnsides* (1) really arises. The charge created by s. 9, sub-s. 1, is the effective security for the Revenue.

My Lords, the last point is that the direction in the will to the executor to pay testamentary expenses is effectual to prevent the creation of the charge which s. 9, sub-s. 1, prescribes. Had it not been that in *In re Hadley* (2) Parker J. so held, observing that the authorities on the point were all one way, I should have thought there could be little doubt about the matter, but his observation was made before the question had been further discussed in the subsequent cases of *Porte* v. *Williams* (3) and *In re Hudson*. (4) I agree that as the executor would have to pay the estate duty on this property on proving the will it is a testamentary expense. It does not follow that the clause negatives the operation of s. 9, sub-s. 1. The section is directory. A provision in a will which prevents it from operating virtually gives to the appointee of the fund a legacy equal in amount to the rateable proportion of the estate duty which is chargeable upon it. This is by no means the necessary or the natural effect of the direction for payment of testamentary expenses. That direction, which is common form of considerable antiquity,

(1) [1903] 1 Ch. 250.
(2) [1909] 1 Ch. 20.
(3) [1911] 1 Ch. 188.
(4) [1911] 1 Ch. 206.

gives the executor an authority and a mandate to pay. True these are otiose, for he derives them, in any case, from the law; but in a will this is of small significance. Further, it serves to define the content of the residuary bequest. I daresay that also could have been dispensed with, but a will had better be explicit. About the actual intention of the testatrix, or the way in which in this particular she might be supposed to have wished to distribute her bounty, I say nothing. Of actual intention on such a point I imagine she had none, and her imputed intention we must get from her draftsman's words. I do not think they suffice to control or defeat the operation of s. 9, sub-s. 1.

In the result I think that the appeal must succeed. I would only add that it is with extreme reluctance that I have arrived at a conclusion which in effect is that *In re Hadley* (1) was wrongly decided in the Court of Appeal. I have the most unfeigned respect for the learning and experience which led to an opposite conclusion in that case. The decision closed a conflict of opinion (finally, as it might have seemed) which had lasted for nine years, and on the faith of that decision many estates have been administered and adjusted, nor does the matter involve any deep principle. The incidence of the duty, after all, is, one way or the other, a matter for a testator's bounty. Still, I cannot say that the decision in *In re Hadley* (1) has stood so long that it ought not to be disturbed; and, at any rate, the point is laid now and cannot rise again.

Lord Parmoor. My Lords, I regret to be unable to concur in the opinions which have been expressed and think that the judgment of the Court of Appeal should be affirmed.

The question to be determined in this appeal is whether estate duty, payable under the Finance Act, 1894, is charged on the residuary estate of the Hon. M. T. B. O'Grady, who died on January 12, 1910. The will of Mrs. O'Grady was duly proved on April 22, 1910. The Court of Appeal, reversing the judgment of Eve J., have held that the estate duty is charged on the residuary estate. It is against this decision that the appeal has been brought to this House.

The property, on which estate duty is payable, is land comprised

(1) [1909] 1 Ch. 20.

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in a settlement subject to a trust for sale, the proceeds being subject to a general power of appointment, which has been exercised by the testatrix, a married woman, in her will. The property was, therefore, at the date of the death of the testatrix, notional personal estate. It was argued, on behalf of the appellant, that, having regard to the terms of the will, the property should be taken to have been reconverted into real estate. My Lords, it is sufficient under this head to express concurrence in the view adopted by all the judges in the Court of Appeal, that, if the estate was at the date of the death of the testatrix personal estate in equity, the intention of the testatrix as to its subsequent reconversion for the purpose of distribution is not material. In other words, the beneficial distribution does not affect the character of the estate at the material date. Eve J. appears to have thought that, if the will operated as a reconversion, the case would fall within the decision of *In re Lord Grimthorpe* (1), but in my opinion that case is clearly distinguishable on the reasoning to be found in the judgment of the Master of the Rolls.

Three main points have emerged in the arguments in this House. The first is whether estate duty payable under the Finance Act, 1894, is charged by s. 9, sub-s. 1, of the Act on the residuary estate of the testatrix. The answer to this question depends on the construction of the Finance Act, and mainly upon the words in s. 9, sub-s. 1, "property passing to the executor as such." The second is whether, if the words in s. 9, sub-s. 1, have a recognized technical meaning, as the appellant contends, they are limited to property which passes to the executor under the grant of probate, and which would similarly have passed to an administrator to whom letters of administration had been granted. The third is whether the estate duty is a "testamentary expense" and thrown on the residuary estate by the terms of the will. "I devise and bequeath and appoint all the residue of my estate and effects, whether real or personal. . . . . Subject to the payment of my general and testamentary expenses." If the first or third point is decided in favour of the respondents, the appellant cannot succeed.

If the residuary estate of the testatrix passes to the executor as

(1) [1908] 2 Ch. 675.

such, within the meaning of those words in s. 9, sub-s. 1, of the Finance Act, 1894, the incidence of the estate duty is different from the incidence of the probate duty at that time in force. It is argued that, in the absence of any sufficient explanation, there is a presumption against a construction which would bring about this result. Prior to the Probate Duty Act, 1860, no probate duty was payable on property over which a testa or had a general power of appointment: *Platt* v. *Routh* (1); *Drake* v. *Attorney General.* (2) The Act of 1860 charged the probate duty thereby imposed on the appointed fund. In *In re Hadley* (3) Parker J. (Lord Parker), after pointing out that if the words in s. 9, sub-s. 1, of the Finance Act, 1894, include property appointed by will under a general power the incidence of taxation will be changed, says that, in his opinion, the exception was framed to prevent this result, and that the exception should be construed in a recognized technical sense, and limited to property to which the executor derives his title by virtue of his office, or, in other words, to property to which he derives title simply by grant of probate, and which would similarly have passed to an administrator to whom letters of administration had been granted. The judgment of Parker J. was reversed in the Court of Appeal. (4) In effect the present appeal raised the question whether *In re Hadley* (3) was rightly decided in the Court of Appeal.

The estate duty, superseding both the probate and the succession duty, is essentially a new duty. There is, in my opinion, no ground for the presumption that, in imposing the new duty, the Legislature desired, or intended, to preserve the special incidence or exemptions attached to probate duty. In the absence of any such presumption the words "property passing to the executor as such" should be construed in their ordinary natural meaning having regard to the context in which they occur and the general subject matter of the Act in which they are found, unless it can be said that at the date of the passing of the Finance Act, 1894, they had a recognized technical meaning. I think it is very difficult to say that the words had a recognized technical meaning in face of the great difference

(1) 6 M. & W. 756.
(2) 10 Cl. & F. 257.
(3) [1909] 1 Ch. 20.
(4) [1909] 1 Ch. 29.

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of judicial opinion, and no authority was quoted to support this contention. Parker J. followed the four cases of *In re Treasure* (1), *In re Maddock* (2), *In re Power* (3), and *In re Dodson* (4), and dissented from the four cases of *In re Moore* (5), *In re Dixon* (6), *In re Fearnsides* (7), and *In re Orlebar.* (8)

I do not think that much assistance can be obtained from a consideration of the provisions contained in other sections of the Finance Act, 1894. Reference was made more than once during the argument to the words used in s. 8, sub-s. 3. The sub-section enacts that the executor shall not be liable for estate duty in excess of the amounts which he has received as executor, or might, but for his own neglect or default, have received. Such a limitation is necessary in justice to the executor, but s. 9, sub-s. 1, is dealing with the totality of the new duty, and the words " property passing to the executor as such " are used to denote a compartment in the distribution of the total charge. I am not therefore impressed with the argument that if the words " assets which he has received as executor " refer to the character in which the assets are received, and not to the way in which the executor's title to receive them has arisen, any inference arises that the exception in s. 9, sub-s. 1, should be similarly construed. I understand that Mr. Maugham did not agree with the construction placed by Parker J. on s. 8, sub-s. 3 ; but this consideration would not, in my opinion, materially affect his general argument.

My Lords, in my opinion, the words " property passing to the executor as such " include all assets passing to the executor because he is executor, and which pass to him in his character of executor either under the grant of probate or after the will has been proved, irrespective of the way in which his title to receive the property has arisen. The words, in my opinion, are not limited so as to exclude property which does not pass to the executor simply under the grant of probate as bona testatoris. I would adopt the words of Farwell L.J. in his judgment in *In re Hadley* (9) : " The plain

(1) [1900] 2 Ch. 648.
(2) [1901] 2 Ch. 372.
(3) [1901] 2 Ch. 659.
(4) [1907] 1 Ch. 284.
(5) [1901] 1 Ch. 691.
(6) [1902] 1 Ch. 248.
(7) [1903] 1 Ch. 250.
(8) [1908] 1 Ch. 136.
(9) [1909] 1 Ch. 20, 36.

meaning of ' as such ' to my mind is in the character of executor as distinguished from his personal capacity or as trustee." I cannot presume that the Legislature intended to import into the Finance Act, 1894, he subtle and difficult problems involved in the distinction between equitable and legal assets, on which there has been so remarkable a difference of legal opinion. On this construction the present appeal fails. In 1750 Lord Hardwicke decided that property voluntarily appointed under a general power by deed should be considered as part of the estate of a testator for the benefit of his creditors in the same way as property appointed under a general power by will : *Lord Townshend* v. *Windham.* (1) This was referred to as stoppage in transitu. Lord Lindley in *Beyfus* v. *Lawley* (2) says : " It cannot now be denied that property appointed by will under a general power is assets for payment of the debts of the appointor, and is not regarded as property of the donor of the power distributable by the donee thereof. The property appointed is in such a case treated as assets of the testator exercising the power, and the assets so appointed are regarded as property bequeathed by him." The question then arises whether property appointed by will under a general power, and which is treated as assets of the testator, passes to the executor in his character of executor. The answer is in the affirmative. I may make my meaning clear by an illustration. Suppose that the appointed fund is 1000*l.*, and that the testator has debts for the satisfaction of which 100*l.* out of 1000*l.* is required. That 100*l.* would, I conceive, pass to the executor as such. It comes to him as assets for the payment of debts. It cannot be that the other 900*l.* comes to him in some other character. Either the whole or none passes to the executor as such. Why is the case different if no part of the fund is wanted for the payment of debts ? Or again, if the donee of the power exercises the power by will but appoints no executor, surely in such a case the administrator takes the fund in his character as administrator. In *In re Hoskin's Trusts* (3), where a married woman, having a general power of appointment by will, appointed the fund under the power, the Vice-Chancellor made an exceptional order

(1) 2 Ves. Sen. 1.
(2) [1903] A. C. 411, 413.
(3) 5 Ch. D. 229 ; 6 Ch. D. 281, 283.

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placing costs on the trustee for coming to Court instead of paying over the appointed sum to the executor. An appeal was brought to the Court of Appeal, not on the question whether the fund should have been paid over, but on the question of costs. It was held that an appeal did not lie on the question of costs. But on the general question James L.J. said: "I may add that if the merits had to be gone into, I should hold it to be established beyond all question that where a feme covert, or any other person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will and appoints an executor, the executor, when he has proved the will, is entitled to receive the appointed fund." If this statement is accurate and the executor is entitled to receive the appointed fund, when he has proved the will, he receives it in his character of executor. This is not more than a dictum, but a dictum of the highest authority.

In *In re Philbrick's Settlement* (1) it was held that when a married woman made a will in exercise of a power and appointed executors, inasmuch as she could only make a will by virtue of the power, and could only have appointed the executors for the purpose of administering the appointed property, the executors were the proper persons to distribute the money among the appointees. It was explained in a passage in the judgment that the expression in *Platt* v. *Routh* (2), that the executor could not have administered any part of the appointed property, only meant that, but for the will exercising the power, the executor could not have administered. In *Hayes* v. *Oatley* (3) it was held that the trusts had been completely discharged when the trustees paid over a fund, appointed by a married woman under a settlement, to the executor. In *In re Hadley* (4) the Master of the Rolls sums up the position: "It is in my view sufficient to say that the executor is the person, and the only person, who can sue for and give a receipt for the fund when appointed, and that he does so receive and so sue for it as executor by reason of the probate." In the present case Joyce J. (5) states in general

(1) 34 L. J. (Ch.) 368.
(2) 6 M. & W. 756.
(3) L. R. 14 Eq. 1.
(4) [1909] 1 Ch. 20, 29.
(5) [1915] 1 Ch. 613, 620.

language: "It is established, in my opinion, that where there is an exercise by will of a general power of appointment by will over that which is actually personal estate or personal estate in equity, such personal estate actual or notional vests in the executor, who has to pay the duties at death."

Mr. Clayton, in his argument on behalf of the respondents, pointed out that it was no part of his case to say that the words in s. 9, sub-s. 1, of the Finance Act, 1894, had a recognized technical meaning, and that it was immaterial, in his view, whether the assets in question were legal or equitable. I agree in this contention, and therefore do not propose to trouble your Lordships with any opinion on a subject on which there appears to be much difference of judicial opinion. I desire, however, to say that the argument of Mr. Maugham did not convince me that there was any flaw in the cogent reasoning of Farwell L.J. in his judgment in *In re Hadley*. (1)

The last question is whether the will throws upon the residuary estate the liability to pay estate duty under the words "testamentary expenses." This question was not argued in the Court of Appeal and depends on the construction of the terms of the will. There appears to be a large concurrence of opinion that residuary estate duty on personalty is within the expression "testamentary expenses," on the ground that without payment of duty the will cannot be proved and a grant of probate obtained. In this respect estate duty stands in the same position as probate duty: *In re Clemow* (2); *In re Treasure* (3); *In re Fearnsides* (4); *In re Hadley*. (1) Mr. Maugham, in his argument, referred to the cases of *Porte* v. *Williams* (5) and *In re Hudson*. (6) In the first of these cases the power of appointment had not been exercised, and in the second it was held that estate duty, where the subject-matter is a donatio mortis causa, is not a testamentary expense, and therefore not payable by the executor under a direction in a will to pay "testamentary expenses" out of the testator's residuary estate. In my opinion the direction in the will of Mrs. O'Grady would throw the payment on the residuary estate, but it

(1) [1909] 1 Ch. 20.
(2) [1900] 2 Ch. 182.
(3) [1900] 2 Ch. 648.
(4) [1903] 1 Ch. 250.
(5) [1911] 1 Ch. 188.
(6) [1911] 1 Ch. 206.

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is not necessary to determine this question in the present appeal.

My Lords, in my opinion, the appeal should be dismissed.

Order of the Court of Appeal reversed. Declare that, inasmuch as the property subject to the power of appointment, though not liable to duty as real estate, was so liable on the ground that it did not pass to the executor "as such" within the meaning of s. 9, *sub-s.* 1, *of the Finance Act,* 1894, *the order of Eve J. be varied accordingly; and subject to such variation said order restored. The costs of all parties in the Courts below and in respect of the appeal to this House to be paid out of the appointed property.*

Lords' Journals, April 13, 1916.

Solicitors for appellant: *Darley, Cumberland & Co.*

Solicitors for respondents: *Gibson & Weldon, for F. W. Romney & Fraser, Malvern.*

[HOUSE OF LORDS.]

ATTORNEY-GENERAL (AT THE RELATION OF BASLOW AND BUBNELL URBAN DISTRICT COUNCIL) } APPELLANT ; AND DERBYSHIRE COUNTY COUNCIL . . . . RESPONDENTS.

H. L. (E.)*
1916
June 2.

Local Government—Isolation Hospital—Hospital Committee—Control by County Council—Power of Council to vary Representation of Constituent Local Authorities—Isolation Hospitals Act, 1893 (56 & 57 *Vict. c.* 68), *ss.* 9, 10, 20—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 32, *sub-s.* 3.

By an order made in 1897 by a county council under the Isolation Hospitals Act, 1893, several districts in the county were formed into a joint hospital district for the provision and maintenance of an isolation hospital for the reception of patients suffering from infectious diseases in the constituent districts, and a hospital committee was constituted consisting of fifteen members, of whom two were to be elected by the county council and thirteen by the authorities of the constituent districts. The hospital committee provided a small-pox hospital to which the county council contributed. Differences having arisen between the county council and the hospital committee as to the adequacy of the hospital accommodation, in 1914 the county council, purporting to act under the powers of s. 32 of the Interpretation Act, 1889, and of the Isolation Hospitals Act, 1893, made a further order which rescinded the regulations of the order of 1897 relating to the constitution of the hospital committee, and provided that the committee should consist of fifteen members, of whom six were to be elected by the authorities of the constituent districts and nine by the county council. One of the local authorities objected that this order was ultra vires :—

Held, upon the construction of the Isolation Hospitals Act, 1893, that the constitution of the hospital committee was wholly in the discretion of the county council, provided it contributed to the funds of the hospital, subject only to a right of appeal to the Local Government Board ; that s. 32, sub-s. 3, of the Interpretation Act, 1889, empowered the county council to rescind the regulations of the order of 1897 ; and that in making the order of 1914 they had acted within their statutory powers.

Decision of the Court of Appeal [1916] 1 Ch. 177 affirmed.

APPEAL from an order of the Court of Appeal reversing a judgment of Sargant J. (1)

* *Present :* VISCOUNT HALDANE, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

(1) [1916] 1 Ch. 177.

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By an order dated April 14, 1897, and made by the respondents, the Derbyshire County Council, under the provisions of the Isolation Hospitals Act, 1893, certain sanitary districts in the county of Derby, including the Baslow and Bubnell Urban Sanitary District, were formed into a united district under the style of the Haddon Joint Hospital District for the purposes of the provision, maintenance, and management of an isolation hospital or hospitals for the reception of patients suffering from infectious diseases in the several constituent districts.

By clause 3 of this order the governing body of the hospital district so constituted was to be the hospital committee, to be called the Haddon District Hospital Committee, and by sub-section 1 of that clause was to consist, subject to sub-section 2 thereof, of fifteen members, of whom two were to be elected by the respondents, and the remaining thirteen by the respective councils of the constituent districts, roughly in proportion to the population of those districts, the relators, the Baslow and Bubnell Urban District Council, electing one member.

Sub-section 2 provided that if permanent isolation hospitals were not erected to the satisfaction of the respondents within a period of five years from the date of the order, then, if the respondents should so determine, the hospital committee to be formed as aforesaid should cease to hold office and a new committee come into existence consisting of nineteen members, of whom the majority were to be elected by the respondents.

Clauses 4 to 9 inclusive contained provisions for the election and rotation of members of the committee, for the filling of casual vacancies, and for the time and place of meeting.

Clause 16 determined the proportions in which the councils of the constituent districts should contribute to a common fund to meet the expenses of the hospital committee.

The committee discharged their duties until the year 1914. During that time they had provided a hospital of eight beds for small-pox, which had never in fact been used, and they had made arrangements with the trustees of another hospital for the use of six beds for scarlet fever cases. The respondents had contributed to the funds of the small-pox hospital. In 1913 differences of opinion arose between the hospital committee and the respondents as to

the adequacy of the hospital accommodation provided by the committee.

By an order dated January 22, 1914, and made by the respondents, after reciting (inter alia) that the respondents by their order of 1897 had formed the Haddon Joint Hospital District under the Isolation Hospitals Act, 1893, and that the said order contained regulations for the election, rotation, and qualification and other matters relating to the constitution of the committee of the said district, and reciting that by the Interpretation Act, 1889, s. 32, provision was made enabling the respondents to rescind, revoke, amend, or vary the regulations above referred to, and that the respondents deemed it expedient to exercise the powers conferred upon them by the statutes in that behalf and any further and other powers enabling them to make the order, the respondents, in pursuance of the powers possessed by them in that behalf, ordered and directed (clause 1) that from and after the commencement of this order the Haddon District Hospital Committee should be constituted in accordance with the regulations set forth in the schedule thereto, and that the regulations in the schedule should apply to the election, rotation, and qualification of the members of the committee and to all other matters provided for by those regulations ; and (clause 2) that from and after the commencement of the order on March 1, 1914, clauses 3 to 9 inclusive (and another clause not material to the present purpose) of the order of 1897 should be rescinded. By the schedule to this order it was provided (amongst other things) that the hospital committee should consist of fifteen members, of whom six were to be elected by the authorities of the constituent districts and nine were to be elected by the respondents. The Baslow and Bubnell Urban District Council, in lieu of electing one member as provided by the order of 1897, were to be associated with the Bakewell Urban District Council in the election of one member.

The present action was brought by the appellant, the Attorney-General, at the relation of the Baslow and Bubnell Urban District Council, in effect for a declaration that the order of January 22, 1914, was ultra vires and for an injunction restraining the respondents from acting upon it.

Sargant J. granted to the appellant the declaration claimed, with

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liberty to apply for an injunction if necessary. The Court of Appeal by a majority (Bankes L.J. and Warrington L.J., Lord Cozens-Hardy M.R. dissenting) reversed this decision and dismissed the action.

1916. May 18, 19. *Maugham, K.C.*, and *Inskip, K.C.* (with them the *Hon. S. O. Henn Collins*), for the appellant. The respondents have no power under s. 32, sub-s. 3, of the Interpretation Act, 1889 (1), to alter the constitution of the hospital committee. Sect. 10, sub-s. 1, of the Isolation Hospitals Act, 1893 (2), imposes upon the county council the duty of making regulations for the election, rotation, and qualification of the members, and for all other matters relating to the constitution of the committee, and the power to rescind or vary contained in sub-s. 3 of s. 32 of the Interpretation Act

(1) Interpretation Act, 1889, s. 32, sub-s. 1: "Where an Act passed after the commencement of this Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

Sub-s. 2: "Where an Act passed after the commencement of this Act confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office."

Sub-s. 3: "Where an Act passed after the commencement of this Act confers a power to make any rules, regulations, or byelaws, the power shall, unless the contrary intention appears, be construed as including a power, exerciseable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or byelaws."

(2) Isolation Hospitals Act, 1893, s. 10, sub-s. 1: "When a hospital district has been constituted, a committee shall be formed by the county council. Any such committee may consist wholly of members of the county council, or partly of members of the county council and partly of representatives of the local area or areas in the district, or wholly of such local representatives. The county council shall make regulations for the election, rotation, and qualification, and for all other matters relating to the constitution of any such committee, subject to these qualifications, that where no contribution is made by the county council to the funds of the hospital, such committee shall consist, unless the constituent local authorities otherwise desire, wholly of representatives of the local area or local areas of the district, and that if any local authority within the hospital district feels aggrieved by the mode in which any such committee is constituted, it may appeal to the Local Government Board, and that Board may modify

is limited to cases where the subsequent Act confers a power, as distinguished from imposing a duty, to make regulations. The language of sub-s. 3 is contrasted with the language of sub-ss. 1 and 2. The first two sub-sections relate to cases where the Act "confers a power or imposes a duty," but sub-s. 3 relates to a case where the Act "confers a power." If you may do a thing you may undo it, but if you must do a thing you may not undo it; otherwise the duty of making regulations would be rendered inoperative by rescinding the regulations. That is the distinction which the Interpretation Act enforces. Where an Act imposes a duty to make regulations there is no power to vary unless that is expressly provided. Sect. 231, sub-s. 5, of the Lunacy Act, 1890, is a case in point. That sub-section requires the managing committee of a lunatic hospital to frame regulations for the hospital and to submit the same to a Secretary of State for approval. Then s. 12 of the Lunacy Act, 1891, provides a power to vary, subject to the approval of a Secretary of State. The inference is that the Legislature recognized that the Interpretation Act did not apply. But, further, there is here a contrary intention within the meaning of sub-s. 3. Sect. 10 of the Isolation Hospitals Act, 1893, means that the regulations for the constitution of the hospital committee shall be made once for all and cannot be altered except under s. 20 with the assent of the local authorities concerned.

Sir Robert Finlay, K.C., and *Tomlin, K.C.* (with them *E. J. Naldrett*), for the respondents.

[VISCOUNT HALDANE intimated that their Lordships desired to hear counsel for the respondents only on the question whether a contrary intention appeared from the Act of 1893.]

The true remedy of the relators is to appeal to the Local Government Board. That obviates all danger of injustice. Sect. 20 applies to an order for the establishment of a hospital under s. 9 and not to an order with reference to the constitution of the hospital committee under s. 10. Sect. 9 deals with the constitution of a hospital district and the establishment of a hospital for that district. Sect. 10 relates to a different subject-matter, namely, the constitution of

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the constitution of any committee so formed by the county council in such manner as the Board think expedient and just."

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the hospital committee, which is to be dealt with by regulations. [They referred to ss. 7 and 8 of the Isolation Hospitals Act, 1901.]

The scheme of the section is that where the county council contribute to the funds of a hospital they are to have an absolutely free hand in the constitution of the committee, subject only to the right of appeal to the Local Government Board. There is nothing in the Act to exclude the operation of s. 32, sub-s. 3, of the Interpretation Act.

Maugham, K.C., in reply. It is said that s. 20 applies only to an order under s. 9, but it is not so limited. It is sought to distinguish between an order establishing a hospital and an order constituting the hospital committee ; but establishing a hospital means establishing a hospital as a going concern, and the constitution of the hospital committee is an essential element in the establishment of a hospital.

The House took time for consideration.

June 2. LORD SUMNER. My Lords, in this case I have had the advantage of reading and considering the opinions which my noble and learned friends Lord Parmoor and Lord Wrenbury are about to read to your Lordships, and I entirely agree in the motion they propose and the reasons that they assign for it.

LORD PARMOOR. My Lords, this appeal raises the question whether the respondents, the Derbyshire County Council, have power to rescind certain regulations made to prescribe the constitution of a hospital committee, formed under s. 10 of the Isolation Hospitals Act, 1893, and contained in an order of the respondents of April 14, 1897. This order established the Haddon Joint Hospital District, which includes the district of the relators. The hospital committee formed by the respondents consisted of fifteen members, thirteen being representatives of the various local authorities, and two of the respondents.

In 1913 differences of opinion arose between the respondents and the hospital committee on the policy to be pursued in the provision of an isolation hospital. As a result, on January 22, 1914, the respondents made an order rescinding the regulations in force for

the constitution of a hospital committee, and directing that the said committee should be constituted in accordance with new regulations set forth in the schedule of the said order. The hospital committee as reconstituted consists of fifteen members, nine of whom are to be elected by the respondents, thus giving the representatives of the respondents an absolute majority of the whole committee and placing the respondents in a position to control the future policy. The appellant contends that the order of 1914, containing the new regulations, is ultra vires, and that if there is any power to alter the original regulations in the order of April 14, 1897, this alteration could only be effected in the manner and subject to the conditions provided by s. 20 of the Act of 1893. Sargant J. made an order in favour of the appellant, but this order was set aside by a majority in the Court of Appeal.

The Isolation Hospitals Act, 1893, is entitled an Act for enabling county councils to promote the establishment of hospitals for the reception of patients suffering from infectious diseases. It appears to be the general scope and intention of the Act to place on county councils the whole duty for the provision of isolation hospitals under the Act and a considerable share of responsibility for their subsequent control and efficiency. The earlier sections are concerned with the constitution of a hospital district and the establishment of an isolation hospital. It is not until after the district has been constituted that the county council are required to form a hospital committee, and to " make regulations for its election, rotation, and qualification, and for all other matters relating to the constitution of any such committee." It will be necessary at a later stage to refer in detail to s. 10, under which the committee is formed and regulations are made.

By s. 3 the county council may provide or cause to be provided an isolation hospital in any district within the county, and such hospital cannot be provided under the Act by any other authority. In the following sections it is enacted that an application may be made to the county council either on the petition of one or more of the local authorities concerned, or of any number of ratepayers not less than twenty-five in any contributory place. In this latter instance the application can be made without the assent of the local authorities, although the districts of such authorities might be included in a

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hospital district. If the county council are satisfied that there is a prima facie case for a local inquiry, "they shall cause such inquiry to be made as to the necessity for the establishment of an isolation hospital." On the conclusion of a local inquiry, as to the necessity of an isolation hospital, the county council are to make an order either dismissing the petition or "constituting a hospital district, and directing an isolation hospital for such district to be established." Apart from any outside application a county council may on their own initiative direct an inquiry to be made by the medical officer of health for the county "as to the necessity of an isolation hospital being established for the use of the inhabitants of any particular district in the county." If the medical officer reports that such a hospital ought to be established, then the same proceedings can be taken for a local inquiry as in the case of an application made by a local authority. The interests of any local authority having any jurisdiction within any part of a proposed hospital district are safeguarded by a right of appeal, within three months of the date of the order, to the Local Government Board, whose decision is final. On such appeal the local authority may object to the formation of the district or to the addition thereto, or subtraction therefrom, of any local area within their district. In the present instance the respondents made an order constituting a hospital district in an area which included the district of the relators, the Baslow and Bubnell Urban District Council, but it does not appear that on the formation of such district any appeal was made to the Local Government Board.

After an order has been made by a county council for the establishment of a hospital, such order may be altered by the county council on the application of a hospital committee and with the assent of any local authority concerned in such alteration. It was argued on behalf of the appellant that this power of alteration, conferred on the county council under s. 20 of the Act, was inconsistent with the claims of the respondents to issue fresh regulations altering the constitution of a hospital committee. In my opinion this contention is untenable. Sect. 20 is limited to an order made under s. 9 and has no reference whatever to regulations made under s. 10.

It is not until after a hospital district has been constituted that

under s. 10 " a committee shall be formed by the county council." The constitution of this committee is wholly within the discretion of the county council, subject to the qualifications that, where no contribution is made by the county council to the funds of the hospital, such committee shall consist, unless the constituent local authority otherwise desire, wholly of representatives of the local area or local areas of the district, and to a right of appeal in all cases to the Local Government Board. In the present instance a contribution has been made and the first qualification does not apply. The county council, therefore, had power to form the hospital committee wholly of members of the county council or to make the representatives of the county in a majority on the committee. There appears to be no reason why a committee should not in the first instance be so constituted, if, in the opinion of the county council, such constitution is best adapted to ensure the proper provision and control of an isolation hospital. The local authorities are protected by a right of appeal to the Local Government Board : " If any local authority within the hospital district feels aggrieved by the mode in which any such committee is constituted, it may appeal to the Local Government Board, and that Board may modify the constitution of any committee so formed by the county council, in such manner as the Board think expedient and just." It was stated during the hearing that an appeal under this provision was standing over until after the decision of this House. If a committee can in the first instance be constituted so as to give a full control to the county council, there is no ground for the suggestion that an order, which proposes to give a majority of representatives on the committee to the county council, is in itself extravagant, or harsh in its treatment of the interests of the local authorities.

It will now be convenient to consider more closely the crucial words in s. 10 on which the decision of this appeal depends : " The county council shall make regulations for the election, rotation, and qualification, and for all other matters relating to the constitution of any such committee." It was argued on behalf of the appellant that the words " for the election, rotation, and qualification, and for all other matters relating to the constitution of any such committee " were not sufficiently wide to include a total reconstitution of the

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committee and must be limited to points of detail or routine. If the words " all other matters relating to the constitution of any such committee " are to be construed as ejusdem generis with the words " election, rotation, and qualification," I think that the word " election " connotes not only matters of detail or routine, but the determination of the bodies by whom the election may be made, and that, if the respondents have authority to make fresh regulations, the actual regulations do not exceed their statutory powers. I think, further, that the regulations may in themselves include provision for alteration in the method of election based on a future contingency, and that the power of readjustment contained in the original order is not ultra vires or invalid. It is, however, not necessary to decide this point if, in substance, the claim of the respondents to alter the original regulations is not inconsistent with the general scope and intention of the Act, and comes within the terms of s. 32, sub-s. 3, of the Interpretation Act.

It is clear that the Isolation Hospitals Act, 1893, does not divest the county council of further responsibility after an order has been made and is inconsistent with the claim that a committee once constituted is entitled to hold an independent position, whatever the views of the county council may be on matters of policy, or general efficiency. Except on one or two matters, for which special provision is made, the hospital committee has no powers to provide a hospital by purchase or otherwise, or to manage or maintain the same, when so provided, except such as the county council may delegate to them. In any such delegation the county council " shall retain to themselves a power of inspection in such hospital and to raise money by loan for the purpose of such hospital." The power of inspection would be largely nugatory if, after a committee had once been constituted, there was, apart from litigation, no further power of effective control. It could hardly be expected that a county council would raise money by loan unless they were in accord with the general policy on which the hospital was managed. The hospital committee have certain powers conferred upon them of acquiring land, but these powers are subject to directions given by the county council. Sect. 15 has an important provision enabling the committee to make arrangements for the training of nurses, but in making such arrangements they are subject to regulations made

by the county council. The two sections of the Act which go furthest to invest the hospital committee with an independent status are ss. 12 and 14. It is, however, not possible to say that the hospital committee may, under s. 12, make rules and regulations for the conduct and management of the hospital, and the patients therein, in respect of matters for which no authority has been delegated to them. The powers exercisable by the committee to provide additional hospital accommodation under s. 14 cannot be detached from the reservation to the county council of the power of raising money by loan. The conclusion is that the Act did not intend to set up hospital committees of independent status and free from all control of the county council, but that in many important functions there is a continuing duty on the county council, and that it is consistent with this duty that the county council should have a power from time to time to alter the constitution of any such committee, if differing from them on matters of policy, or if not satisfied with the efficiency of their administration. In all cases the exercise of this power is subject to an appeal to the Local Government Board. It is not the intention of their Lordships to express any opinion on matters within the jurisdiction of the Local Government Board and which the Act delegates to the final decision of that Board.

It remains to consider the Interpretation Act, 1889. Sect. 32, sub-s. 3, of the Act is as follows: "Where an Act passed after the commencement of this Act confers a power to make any rules, regulations or byelaws, the power shall, unless the contrary intention appears, be construed as including a power, exerciseable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or byelaws." For the reasons already stated no contrary intention appears in the Act which would make this section inapplicable to the regulations made under s. 10 of the Isolation Hospitals Act, 1893, but the appellant contends that the application of the Interpretation Act is excluded because the county council in making regulations is not exercising a power but performing a duty. When, however, a duty is to be performed by making regulations there is necessarily a power to make such regulations, and the fact that the exercise of the power is obligatory cannot be said to make any difference. The

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counsel for the appellant further argued that, whereas sub-ss. 1 and 2 of s. 32 refer both to conferring a power and imposing a duty, and sub-s. 3 refers only to cases in which a power is conferred, this difference of language must import a difference of meaning. I think that this argument cannot be accepted, and to introduce the words " imposing a duty " into sub-s. 3 would introduce a duty to rescind, revoke, or alter regulations which the county council had made, and that this intention cannot without absurdity be attributed to the Legislature.

My Lords, I am of opinion that the order under appeal is right, and that this appeal should be dismissed with costs.

I am authorized to say that Viscount Haldane concurs in this opinion.

LORD WRENBURY. My Lords, a general review of the Isolation Hospitals Act, 1893, leads to the conclusion that its purpose and effect is to cast upon the county council the duty and responsibility of seeing to the supply of hospital accommodation such as is contemplated by the Act, and to provide for the existence of a hospital committee to be created in such manner and to have such powers as the Act directs. The former is an existing body upon which a new statutory duty is cast; the latter is a new body owing its existence to action taken by the former body under provisions in the Act.

The Act opens, in s. 3, with a primary substantive operative provision that the county council may provide or cause to be provided an isolation hospital. It goes on to add machinery to give effect to the new statutory provision. Under s. 4 it is competent to any local authority or authorities, or to a certain number of ratepayers in a contributory place, to take the initial steps and make an application to the county council. In that case the applicants are to state the district which they propose (s. 5). It may comprise one local area or more than one. The county council may under s. 8 vary the district which the applicants propose by adding or subtracting any local area. If the county council and the local authorities do not agree as to what the district is to be, there may be an appeal to the Local Government Board (s. 5, sub-s. 3). Alternatively, the county council may initiate the proceedings (s. 6). In

that case they will name the local area or areas which they propose to include in the district. Sect. 7 provides for a local inquiry. When all this has been done, the county council, under s. 9, (unless it dismisses the application) is to make an order "constituting a hospital district, and directing an isolation hospital for such district to be established."

At this stage s. 10, sub-s. 1, for the first time comes into effect. The initial words of the clause are "When a hospital district has been constituted, a committee shall be formed by the county council." The formation of the hospital committee, therefore, and the regulations for which s. 10, sub-s. 1, provides are to be determined and made not concurrently with but after an order has been made under s. 9.

I leave the further consideration of s. 10, sub-s. 1, the clause upon which this case turns, until I have looked further into the Act to see what the position, authority, and duties of the hospital committee are.

From s. 10, sub-s. 1, I learn that the hospital committee are to have such powers of (inter alia) managing and maintaining the hospital as the county council may delegate to them. In ss. 11 and 15 I see that in some of the most important acts which the committee can have to do it is to act "subject to any directions given" or "subject to any regulations made" by the county council.

In s. 12 I see that the committee may from time to time make rules for the conduct and management of their hospital. But inasmuch as their powers of management are derived from the county council, by delegation, under s. 10, sub-s. 2, I cannot find in s. 12 much independent right of action. Sect. 14 empowers the hospital committee to do certain important acts in providing hospital accommodation, but, seeing that s. 10, sub-s. 2, enacts that the committee shall have such power "of providing a hospital by purchase or otherwise . . . . as the county council may delegate to them," s. 14 must, I think, be read as an authority to do these acts in pursuance of a power delegated by the county council.

All the provisions to which I have called attention seem to me to indicate that the view which presents itself upon looking at the earlier sections of the Act, namely, that the county council is the

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primary authority and the hospital committee an assistant body, is the right view.

Turning then to s. 10, sub-s. 1, is the appellant right in contending that the direction given to the county council to form a hospital committee and to make regulations is a direction to be executed once for all, and that, when once executed, the county council is left functus officio, with no further duty or authority in those matters? My Lords, I think not. The county council may make regulations for the election, rotation, and qualification of the members of the hospital committee. They are not confined, therefore, to naming the original members of the body; they may by regulation control the fluctuations in the body. They may define, as they think right, the qualifications of the future members of the hospital committee (with certain limitations dependent upon whether the county council contribute to the funds or not) and can therefore by their original regulations so fix the qualification for future office as to change from time to time the proportionate representation of any local area. I see no ground for saying that they may not achieve the same result by altering from time to time the regulations which they are by the Act empowered to make. The appellant contends that a power to alter is given by s. 20; that certain consents are then required, and that there is no other power of alteration. My Lords, s. 20 has, in my opinion, no operation as regards these regulations. It is confined to the case of alteration of the order made by the county council "for the establishment of a hospital." That is the order mentioned in s. 9, and, as I have pointed out, the action of the county council under s. 10, sub-s. 1, cannot be taken until after that order has been made. It is worthy of notice that the Act of 1901, by ss. 7 and 8, treats the order under s. 9 and the action under s. 10 as different matters.

If the matter rested upon the above Acts alone, I should be of opinion that the appellant must fail.

But it remains to consider the Interpretation Act, 1889. The word "regulations" in s. 10, sub-s. 1, of the Act of 1893 is the same as the word "regulations" in s. 32, sub-s. 3, of the Interpretation Act. Why does not the Interpretation Act apply? The appellant says that its application is excluded by the fact that the county council have here not a power, but a duty. He contends that

s. 32, sub-s. 3, of the Interpretation Act is to be read as if the words were "confers a power without imposing a duty." I cannot agree. If one owes a statutory duty he must have power to do the act which he has the statutory duty to do. The county council, therefore, owing the duty, have the power and are within the section. But, says the appellant, sub-ss. 1 and 2 of s. 32 use the words "confers a power or imposes a duty," while sub-s. 3 uses only the words "confers a power." The difference of language must, he says, import a difference of meaning. Again I cannot agree. To use the same words in sub-s. 3 would make the clause ridiculous. If the same words were used the effect of the sub-section would be that where an Act imposes a duty to make regulations, the duty shall be construed as including a duty to rescind, revoke, or vary the regulations.

The appellant, however, further contends that a "contrary intention" within s. 32, sub-s. 3, of the Interpretation Act here appears. I have already given my reasons for the conclusion that the purpose and effect of the Act is to make the county council the paramount authority. I find no intention of excluding a power to vary the regulations which they are ordered to make. The local authority is not prejudiced by attributing to s. 10, sub-s. 1, the construction directed by the Interpretation Act. For in respect of the act, whatever it is, that the county council have power to do the section gives an appeal to the Local Government Board.

My Lords, for these reasons I am of opinion that the order under appeal is right, and that this appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 2, 1916.

Solicitors for appellant: *Guscotte, Wadham, Tickell & Co., for Goodwin & Cockerton, Bakewell.*

Solicitors for respondents: *Kingsford, Dorman & Co., for N. J. Hughes-Hallett, Derby.*

[HOUSE OF LORDS.]

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JOHN RUSSELL AND COMPANY, LIMITED . APPELLANTS;

AND

CAYZER, IRVINE AND COMPANY, LIMITED . RESPONDENTS.

Practice—Service out of Jurisdiction—Writ issued in King's Bench Division against Two Defendants both domiciled in Scotland—Acceptance of Service by First Defendant—Service of Concurrent Writ in Scotland on Second Defendant—Rules of the Supreme Court, Order XI., r. 1 (g).

By Order XI., r. 1 (*g*), service out of the jurisdiction of a writ of summons may be allowed where "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

The plaintiffs shipped goods at Liverpool on a ship owned by a company domiciled in Scotland for carriage to Calcutta. On her arrival at Madras the ship was requisitioned by the Indian Government and the cargo discharged. Thereupon another company domiciled in Scotland, without the knowledge or consent of the cargo owners, loaded the cargo on a ship in which they were interested and which was then bound for Calcutta, and on her way to Calcutta this ship was sunk by an enemy cruiser, and her cargo, including the plaintiffs' goods, was lost. The plaintiffs issued a writ in the King's Bench Division against both companies, claiming damages for breach of contract or duty in the carriage of goods by sea and for trespass and wrongful conversion of the goods. The writ was marked "Not for service out of the jurisdiction." The first defendants consented to the jurisdiction, and their London solicitors accepted service on their behalf. The plaintiffs then, by leave of the Court under Order XI., r. 1 (*g*), issued a concurrent writ and served it on the second defendants in Scotland. These defendants, after entering a conditional appearance, applied to have the concurrent writ and the service thereof set aside:—

Held, that the consent of the first defendants to the jurisdiction could not affect the rights of third parties, and that the action was not "properly brought" against the first defendants within the meaning of Order XI., r. 1 (*g*), and therefore the concurrent writ and the service thereof ought to be set aside.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing an order of Rowlatt J. in chambers.

The appellants were shippers of certain goods on the steamship

* *Present:* VISCOUNT HALDANE, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

Masunda, owned by the Glasgow United Shipping Company, Limited, under a bill of lading dated at the port of Liverpool, July 8, 1914, for carriage and delivery at Calcutta. The bill of lading was signed by the master on behalf of the owners, but contained in the margin the words "The Clan Line Steamers Limited, Cayzer, Irvine & Co. Limited, Glasgow Liverpool and London," and the ship was at the time under charter to the Clan Line Steamers, Limited, of which company the respondents, Cayzer, Irvine & Co., Limited, were the managers. The *Masunda* arrived at Madras on August 18, 1914, and was there requisitioned by the Indian Government, and her cargo, including the appellants' goods, was discharged and left at Madras. Thereafter the respondents, without the knowledge or consent of the cargo owners, took the cargo and loaded it on the *Clan Matheson*, one of the vessels of the Clan Line, then bound for Calcutta. The *Clan Matheson*, while on her way from Madras to Calcutta with the appellants' goods on board, was sunk on September 14, 1914, by the German cruiser *Emden*, and all her cargo was lost.

On January 5, 1916, the appellants issued a writ in the King's Bench Division of the High Court of Justice against the Glasgow United Shipping Company, Limited, and the respondent company, claiming "damages for breach of contract or duty in and about the carriage of goods by sea and/or for trespassing against or wrongfully depriving the plaintiffs of such goods and converting the same." The address in the writ for each of the defendant companies was "of Glasgow, Scotland," and the writ was marked "Not for service out of the jurisdiction." Each of the defendant companies was incorporated under the Companies Acts with its registered office at Glasgow in Scotland. The writ was not served on the Glasgow United Shipping Company, but their London solicitors accepted service on their behalf and gave an undertaking to appear in due course. The appellants then applied for leave to issue a concurrent writ of summons with liberty to serve the same out of the jurisdiction on the respondents under the terms of Order XI., r. 1 (*g*), of the Rules of the Supreme Court. (1) This application,

(1) Order XI., r. 1: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever—

. . . . .

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having been refused by the judge in chambers, was granted by the Court of Appeal, and the concurrent writ was served on the respondents in Glasgow. The respondents entered a conditional appearance, and immediately took out a summons asking that the order of the Court of Appeal might be rescinded and that the concurrent writ and the service thereof might be set aside.

Rowlatt J. refused the application, but gave leave to the respondents to appeal. The Court of Appeal (Swinfen Eady, Pickford, and Bankes L.JJ.) reversed the order of Rowlatt J. and made an order in the terms of the summons. The Lords Justices were of opinion that, assuming that the Glasgow United Shipping Company were duly served within the jurisdiction, the action was not properly brought within the meaning of the rule against the first-named defendants, since it could only be maintained by reason of their voluntary agreement to appear.

Adair Roche, K.C. (with him *R. A. Wright*), for the appellants. The question turns upon the construction of Order XI., r. 1 (*g*). That rule contains no special limitation in favour of Scotland or Ireland such as is to be found in r. 1 (*e*). To enable the second defendants to be brought in the first condition is that the action shall have been "properly brought" against the first defendants, and upon that question the position of the second defendants ought not to be regarded. "Properly brought" means that there must be a good cause of action against the first defendants founded on facts which prevent its being a frivolous or vexatious action. Then the second condition is that the first defendants shall have been "duly served within the jurisdiction." The first defendants, by appointing their London solicitor to accept service, are in the same position as if they were served within the jurisdiction, and upon this point the Court of Appeal were in the appellants' favour. Assuming that there is jurisdiction under r. 1 (*g*) to bring in the second defendants, r. 2 reserves full power to the Court to consider the comparative convenience of proceeding in England or in Scot-

"(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

land, but it is not here contested that the more conveneint course is to try this action in England. Under the existing circumstances this action is properly brought and properly constituted against the first defendants, and the Court has jurisdiction to entertain it. Consent gives jurisdiction as much as residence within the jurisdiction.

Lastly, upon the facts the second defendants are necessary or proper parties to the action. [He cited *Copin* v. *Adamson* (1); *Massey* v. *Heynes & Co.* (2); *Tharsis Sulphur and Copper Co.* v. *Société des Métaux* (3); *Witted* v. *Galbraith* (4); *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (5)]

[LORD WRENBURY referred to *Clokey* v. *London and North Western Ry. Co.* (6)]

Maurice Hill, K.C., and *Stuart Bevan*, for the respondents were not called on.

VISCOUNT HALDANE. My Lords, this appeal raises a question of service out of the jurisdiction. There was a contract under which goods were to be carried from Liverpool to India; the contract was made by a Glasgow firm, and it is alleged to have been broken. The goods were conveyed by a steamer in which they were shipped, and that steamer proceeded to Madras, and there the Government requisitioned it, so that under the restraint of princes clause the carrier was freed from further responsibility. But the defendants Cayzer, Irvine & Co., of Glasgow, who apparently had something to do with shipping matters at Madras, took on the goods in one of their steamers, as it is said without any authority from the plaintiffs in the present case, and the ship on which the goods were put was sunk by the *Emden* and the goods were lost. The plaintiffs claim against the two defendants in this case, the Glasgow Shipping Company and Cayzer, Irvine & Co., on different grounds—the Glasgow Shipping Company for a breach of contract and also for conversion of the goods entrusted to them for carriage, and Cayzer, Irvine & Co. for trespass.

Now the wrong committed was committed out of the jurisdiction,

(1) (1875) 1 Ex. D. 17.
(2) (1888) 21 Q. B. D. 330, 334.
(3) (1889) 58 L. J. (Q.B.) 435.
(4) [1893] 1 Q. B. 431; (C. A.) ibid. 577.
(5) [1898] 1 Q. B. 487.
(6) [1905] 2 I. R. 251.

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and both the defendant firms are incorporated companies having their principal offices in Glasgow, and they are also out of the jurisdiction. But what happened was that one of the defendants, the Glasgow Shipping Company, thought it convenient that the proceedings should be in England, and consented to service upon an agent in England, and against them the action can proceed. Now an application has been made for leave to serve out of the jurisdiction upon Cayzer, Irvine & Co. in order to get the whole of the questions raised tried together. The application is made under Order XI., r. 1 (*g*), of the Rules of the Supreme Court, which says that where "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction," service out of the jurisdiction may be allowed; and the real question is whether the action is one which is properly brought against some other person duly served within the jurisdiction within the meaning of this rule.

My Lords, I do not think that the case is one in which any of the authorities which have been cited are decisive. The whole question is one as to the construction of the rule, and in order to construe the rule it is necessary to see upon what jurisdiction depends apart from the rule. Now, my Lords, it is quite true that jurisdiction can be given by accepting service, that is to say, by consent. The root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ, and can be compelled consequently to submit to the decree made, is a person over whom the Courts have jurisdiction. In other countries that is different; in Scotland jurisdiction is to a considerable extent made dependent upon the presence within the jurisdiction of property of the defender who may be outside the jurisdiction. But we are concerned with the rule based upon the English jurisprudence, and that jurisprudence is prima facie as I have stated. It has been extended by the rules which have been made as to service out of the jurisdiction. These rules have been made with scrupulous care because there arose some time ago a conflict between the Scotch Courts and the English Courts about jurisdiction, and the rules were framed with a view of preventing such conflicts from arising again. Under r. 1 (*e*), where a contract is

made outside the jurisdiction and a breach takes place within the jurisdiction, an action may be brought and service out of the jurisdiction allowed against the defendant, provided he is not a defendant ordinarily domiciled or resident in Scotland or Ireland. I cite that merely for the purpose of showing how carefully these things have been dealt with in the rules, and not for any other reason, because I think we have nothing to do with it directly here. The whole question in the present case arises under r. 1 (*g*) to which I have referred, and the question is whether the action has been properly brought within the meaning of the rule which I have read.

Now, my Lords, although, as I have pointed out, the acceptance of service confers jurisdiction, it does not necessarily make it a duty of the Court to decide the case. The sphere of jurisdiction and the sphere of the right which the acceptance of service confers upon the Court are not conterminous. For example, the Court may decline jurisdiction on the ground that it is contrary to its duty to entertain it. If the action relates to matrimonial status, then, according to well-settled principles of private international law,—well settled at any rate so far as this country is concerned—the Courts will now refuse to interfere unless the parties are domiciled—the husband at any rate—in this country. If the action relates to land abroad similarly the Courts decline jurisdiction because they cannot go into questions of title under foreign law. Again, if a foreign Sovereign is sued, although it might be possible to serve him within this country, the Court would decline to regard the service as giving rise to jurisdiction, unless, indeed, the foreign Sovereign chose voluntarily to submit. My Lords, these things show that jurisdiction and service are not conterminous, and, consequently, when an action is spoken of as properly brought, it may well be that something more than the mere question of rights arising out of the fact of service was in the contemplation of those who framed that rule.

My Lords, I think that "properly brought" refers to something more than the mere fact that one of the parties has been served, and in that way jurisdiction has been obtained over that person. It seems to me by its context to imply considerations affecting the other person out of the jurisdiction as well as the person out of

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the jurisdiction who has been served by leave. Consequently you have to look and ask yourself whether when the action was brought it was an action that was properly brought within the rule interpreted in that wider sense.

Now the action was brought when the writ was issued, and the writ was marked, as Swinfen Eady L.J. in his judgment in the Court of Appeal points out, as "Not for service out of the jurisdiction"; consequently there was no action "properly brought" against anybody out of the jurisdiction at that time, and it was not until a later stage when the Glasgow Shipping Company, one of the defendants, came in and accepted service that there was an action brought at all against them.

My Lords, I do not think that in the wider meaning of "properly brought" the rule has been complied with as regards Cayzer, Irvine & Co. It seems to me that the application is therefore one which the Courts have no jurisdiction to entertain; they certainly have none at common law, and if I am right in my construction of the words "properly brought" they have none under this rule. I am therefore of opinion that the appeal fails and should be dismissed with costs.

LORD SUMNER. My Lords, I also think that the appeal fails. It is not enough for the plaintiff, when he applies under Order XI., r. 1 (*g*), for leave to join a person out of the jurisdiction, to be able to point to an action, though the person out of the jurisdiction is not yet a party to it, which can be said to be "properly brought" in this sense, that the defendant to it cannot now object to it as having been improperly brought, seeing that some irregularity in the procedure or some objection which he could have taken has been waived by him. The words "properly brought" enure to the protection of the person out of the jurisdiction whom it is proposed to serve with process. His protection is not to be found exclusively in the words "a necessary or proper party." In the language of Pickford L.J. in the Court below, the persons who are already defendants in the action, although they may submit to the jurisdiction and so preclude themselves from raising any objection, cannot by that procedure affect the rights of third parties. The party out of the jurisdiction in my view is entitled, before

he is brought into a proceeding to which he would normally remain a stranger, to this protection, that the procedure laid down in the rules and orders shall have been followed, and not merely put in force against another party, who has not objected to the procedure being departed from.

It is unnecessary to express any opinion as to the effect of the words "duly served within the jurisdiction," but if I had had a doubt as to the construction of the words "properly brought" I should certainly have expected to find that the words "duly served" could be so construed as to give the party out of the jurisdiction the same protection.

LORD PARMOOR. My Lords, I concur. I think that the words "properly brought" clearly enure to the protection of the person out of the jurisdiction. In other respects I should like to adopt what was said by Pickford L.J., with whose judgment I entirely agree.

LORD WRENBURY. My Lords, in this case the appellants, John Russell & Co., Limited, brought an action against two defendants, describing them both as "of Glasgow in Scotland"; they were therefore both parties out of the jurisdiction. I doubt myself whether such a writ ought to be sealed without leave. I find that in a case in Ireland—*Clokey* v. *London and North Western Ry. Co.* (1)—Palles C.B., in giving judgment, said this: "In England the rule is, that if the defendant's address, as given in the writ, is a foreign one, the clerk in the Record and Writ Office will not seal the writ unless an order giving liberty to issue it is produced." That was said after certain cases in England had been cited to the Court. I have not had the opportunity of referring to them and seeing how far they justify the observations made by the Chief Baron. I have forborne from doing so because it is not necessary to pursue the question in this case, inasmuch as the writ in point of fact was sealed. I express my doubt, however, whether such a writ ought to be sealed without leave. The writ was sealed, and one of the two Scotch defendants, the Glasgow Shipping Company, accepted service and entered an

(1) [1905] 2 I. R. 251, 257.

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Lord Wrenbury.

appearance. The question for determination is whether under those circumstances Order XI., r. 1 (*g*), can be brought into operation so as to bring the other defendants who are out of the jurisdiction within the jurisdiction of the Court. That turns upon the proper construction of the words of Order XI., r. 1 (*g*). Was this an action "properly brought" against some person other than Cayzer, Irvine & Co. "duly served within the jurisdiction"? My Lords, those words, to my mind, do not mean founded upon a good cause of action. Many an action properly brought may turn out to be founded upon no good cause of action. It may break down on the facts; it will nevertheless have been properly brought in the sense that a good cause of action was alleged. "Properly brought" in this rule means, I think, or at any rate includes, brought with a due observance of the process of the Court against a person who could properly be served with the process of the Court, and not because he chooses voluntarily to submit himself to the jurisdiction of the Court. That has not happened here. The exact question for determination is this: Can one defendant by consent by submitting to the jurisdiction confer jurisdiction as against another defendant? My Lords, in my opinion he cannot. I think the action mentioned in Order XI., r. 1 (*g*), as one "properly brought" means an action brought by a plaintiff against a defendant by virtue of the user of the process of the Court—not by user of the process with the addition of a voluntary submission by the defendant to the jurisdiction of the Court.

That being so, it seems to me that the case is not within the rule, and that this appeal fails.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 2, 1916.

Solicitors for appellants: *Ballantyne, Clifford & Hett.*
Solicitors for respondents: *Coward & Hawksley, Sons & Chance.*

[HOUSE OF LORDS.]

DAIMLER COMPANY, LIMITED . . . . . APPELLANTS; H. L. (E.)*

AND

1916

CONTINENTAL TYRE AND RUBBER COMPANY (GREAT BRITAIN), LIMITED . . } RESPONDENTS.

June 30.

Alien Enemy—Limited Liability Company registered in England—Share Capital held by Alien Enemies—Trading with the Enemy—Right to sue—Authority of Secretary to bring Action on behalf of Company.

A company was incorporated in England with a capital of 25,000*l.* in 1*l.* shares for the purpose of selling in England tyres made in Germany by a German company, who held the bulk of the shares in the English company. The holders of the remaining shares (save one) and all the directors were Germans resident in Germany. The one share was registered in the name of the secretary, who was born in Germany, but resided in England and had become a naturalized British subject.

After the outbreak of the war between England and Germany an action was commenced in the name of the English company by specially indorsed writ, issued by the company's solicitors on the instructions of the secretary, for payment of a trade debt. In answer to a summons for judgment under Order XIV. the defendants alleged (1.) that the company was an alien enemy company and that payment of the debt would be a trading with the enemy; (2.) that the action was commenced without the authority of the company. The Master gave leave to the plaintiff company to sign final judgment, and his order was affirmed by the judge in chambers and by the Court of Appeal:—

Held, that the action was commenced without authority and ought to be struck out as irregular.

Held, further, apart from the question of authority, by Lord Atkinson, Lord Parker of Waddington, Viscount Mersey, Lord Kinnear, and Lord Sumner, that leave to defend the action ought to have been granted, as the circumstances were such as to require investigation in reference to the control and management of the company; by the Earl of Halsbury, that the company was in substance a hostile partnership and was therefore incapable of suing, and that any payment to it would be illegal as a trading with the enemy; by Lord Shaw of Dunfermline and Lord Parmoor, that the company, being registered in England and carrying on business in

* *Present:* EARL OF HALSBURY, VISCOUNT MERSEY, LORD KINNEAR, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

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England, was not an enemy company or a company of an enemy character.

Order of the Court of Appeal [1915] 1 K. B. 893 reversed.

Per Lord Parker of Waddington (with the concurrence of Viscount Mersey, Lord Kinnear, and Lord Sumner):

Semble a company incorporated in the United Kingdom and carrying on business here or in a neutral country by properly authorized agents resident here or in the neutral country is prima facie to be regarded as a friend; but it will assume an enemy character if its agents or the persons de facto in control of its affairs are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies; and any person knowingly dealing with a company in such a case is trading with the enemy. The character of individual shareholders cannot of itself affect the character of the company; but the enemy character of individual shareholders and their conduct may be material on the question whether the company's agents or the persons de facto in control of its affairs are in fact adhering to, taking instructions from, or acting under the control of enemies. A company incorporated in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy.

APPEAL from a decision of the Court of Appeal (1) affirming an order of Scrutton J. in chambers.

The facts are fully stated in the judgment of Lord Atkinson. They may be shortly summarized as follows: On October 23, 1914, an action was commenced in the name of the respondent company by specially indorsed writ for 5605*l.* 16*s.* alleged to be due from the appellants for principal, interest, and notarial charges on three bills of exchange drawn by the respondents and accepted by the appellants in payment for goods supplied to them by the respondents prior to the outbreak of the war with Germany. The writ was issued by the solicitors of the respondent company upon the instructions of the secretary. On October 30, 1914, a summons was taken out on behalf of the respondent company under Order XIV. for leave to sign judgment for the amount of the claim with interest and costs. This summons was opposed by the appellants on the grounds that the company and its officers were alien enemies and that consequently the company was incapable of instituting these proceedings or of giving a good and valid discharge for the

(1) [1915] 1 K. B. 893.

amount claimed; and, further, that the appellants, in paying that amount, would be acting in contravention of the Trading with the Enemy Act, 1914. The appellants therefore contended that the proceedings were wrongly instituted and that unconditional leave to defend should be given to them.

The respondent company was incorporated under the Companies Acts on March 29, 1905, with a capital of 10,000*l.*, subsequently increased to 25,000*l.*, in fully paid 1*l.* shares, and had its registered office in London. It was formed for the purpose of selling in the United Kingdom motor car tyres made in Germany by a company incorporated in that country under German law. At the date of the writ the German company held 23,398 shares in the respondent company, and the remaining shares, except one, were held by subjects of the German Empire. The one share was registered in the name of Mr. Wolter, the secretary of the company, who was born in Germany, but resided in this country and in 1910 became a naturalized subject of the Crown. All the directors were subjects of the German Empire, and three of the four directors were resident in Germany when war was declared; the fourth, who had previously resided in England, left this country for Germany on the outbreak of the war.

The Master made an order that the respondent company be at liberty to sign final judgment in the action. This order was affirmed by Scrutton J. in chambers, and the order of the learned judge was affirmed by the Court of Appeal (Lord Reading C.J., Lord Cozens-Hardy M.R., Kennedy L.J., Phillimore L.J., and Pickford L.J.; Buckley L.J. dissenting).

The appeal from the order of Scrutton J. was by consent heard together with an appeal from an order of Lush J. in an action brought by the respondent company against Thomas Tilling, Limited, which raised a similar point, and one judgment was delivered in both appeals. In the latter action Wolter was called as a witness and stated that the business of the respondent company was managed before and since the war by himself and two managers, both of whom were resident in England; that on his appointment as secretary in 1907 he was authorized by the board of directors to give instructions for the issue of writs in this country without reference to the board, and that he had frequently

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caused writs to be issued in the name of the company; but no minute of any resolution conferring this power upon him was produced.

Lush J. accepted the evidence of Wolter as to his authority, and in the Court of Appeal Lord Reading C.J., who delivered the judgment of the majority, agreed with this finding.

The Lord Chief Justice held, first, that the company was a separate legal entity and did not change its character of an English company because on the outbreak of war all its shareholders and directors resided in an alien enemy country and became alien enemies; and, secondly, that the company's solicitors had authority to institute these proceedings on behalf of the company.

1916. Feb. 21, 22, 24, 25. *Gore-Browne, K.C.*, and *H. Maddocks*, for the appellants. The main question is whether a company registered and carrying on business in England, but of which all the corporators are enemy aliens, is an English company, and whether a trading with such company is a trading with the enemy. It is true that the Trading with the Enemy Proclamation of September 9, 1914, says that enemy character attaches only to bodies incorporated in an enemy country, but it cannot be contended that the Proclamation intended to alter the common law and say that a corporation adhering to the enemy, if incorporated in this country or in a neutral country, was a corporation with whom the subjects of this country might have commercial intercourse, or that the Proclamation amounted to an implied licence to trade with such corporation. The Trading with the Enemy Act, 1914, in defining the meaning of trading with the enemy, expressly recognizes and retains the common law offence of trading with the enemy. The effect of the statute and the Proclamation together is to leave the matter as it was at common law: *Robson* v. *Premier Oil and Pipe Line Co.* (1) At common law trading with the enemy, in the absence of a licence from the Crown, is illegal, and no action can be maintained by or in favour of an alien enemy. [Upon this point they referred to *Gist* v. *Mason* (2); *The Hoop* (3); *Potts* v.

(1) [1915] 2 Ch. 124. (2) (1786) 1 T. R. 84.
(3) (1799) 1 C. Rob. 129.

Bell (1); *Brandon* v. *Nesbitt* (2); *Kensington* v. *Inglis*. (3)] And in determining who is an enemy, residence, and not nationality, is the test. Thus a British subject residing under the allegiance of a hostile State loses his right to sue, and if one or more partners of a firm are resident and carry on trade in an enemy's country the firm cannot sue, nor can a member of the firm sue on its behalf: *M'Connell* v. *Hector* (4); and see *Wells* v. *Williams* (5); *The Indian Chief* (6); *De Luneville* v. *Phillips*. (7) This is a question of public policy, and public policy looks at the substance and not at the form of the transaction. What is trading and what is an enemy are both questions to be determined by the substance of the case: see 67 U. S. (2 Black) at p. 674. Applying these principles to corporations, a corporation all of whose corporators and directors are alien enemies falls within the prohibition against trading with the enemy. It is true that a corporation is distinct from its corporators; but a corporation can only act through its agents, and here the agency must necessarily be of an alien enemy character. If the whole thinking power of this company is German the corporation is German. It matters not where the company is incorporated, a company resides where its real business is carried on, and the real business is carried on where the central control and management abide: *Cesena Sulphur Co.* v. *Nicholson* (8); *De Beers Consolidated Mines* v. *Howe* (9); *American Thread Co.* v. *Joyce* (10); and if the motive power of the company determines its residence it also determines its character: *Netherlands South African Co.* v. *Fisher*. (11) *Janson* v. *Driefontein Consolidated Mines* (12) is not inconsistent with these cases. *Gramophone and Typewriter, Ld.* v. *Stanley* (13) was addressed to a different point and does not affect the question. The respondent company is therefore an alien enemy company, and it is a breach of the prohibition against trading with the enemy to make any payment to it. Even assuming that the company is an English

(1) (1800) 8 T. R. 548.
(2) (1794) 6 T. R. 23.
(3) (1807) 8 East, 273.
(4) (1802) 3 Bos. & P. 113.
(5) (1697) 1 Salk. 46.
(6) (1801) 3 C. Rob. 12.
(7) (1806) 2 Bos. & P. (N.R.) 97.
(8) (1876) 1 Ex. D. 428, 452.
(9) [1906] A. C. 455, 458.
(10) (1913) 6 Tax Cas. 163.
(11) (1901) 18 Times L. R. 116.
(12) [1902] A. C. 484.
(13) [1908] 2 K. B. 89.

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company, it would still be a breach of the rule to make any payment to it, because, all the corporators and directors being alien enemies, any such payment would be a payment for the benefit of alien enemies. Further, inasmuch as all the directors and all the corporators, or all the corporators save one, are alien enemies, they are incapable of doing any corporate acts on behalf of the company. They have been struck with sterility by the outbreak of the war. The company is in a state of dormancy or abeyance; for the time being it has ceased to exist; and it is therefore incapable of commencing or sustaining an action in this country: *Rex* v. *Pasmore* (1); *Colchester Corporation* v. *Brooke*. (2)

Lastly, the secretary had no authority to instruct the company's solicitors to bring this action. Assuming that the directors had power under the articles of association to authorize the secretary to bring actions in the name of the company, on the evidence they did not do so, and since the outbreak of the war they became incapable of doing so. It may be said that this question of want of jurisdiction should have been raised by a motion to stay proceedings, but that, though the usual course, is not an absolute rule. This action having been commenced without authority, the Master should not have given leave to sign judgment, but the action should have been stopped in limine.

Upjohn, *K.C.*, and *D. M. Hogg*, for the respondents. Under no circumstances can a company incorporated in England, carrying on its business in England, and having its management in England be held to be an alien eneny, unless it is proved that it is actually assisting the enemy. So far as a company has any nationality, the nationality of this company is English. The fact that this company is controlled by the German company by reason of its having the bulk of the shares in it does not import that the business of the English company becomes the business of the German company, so that it can be said that the central management and control of the business abide in the German company: *Gramophone and Typewriter, Ld.* v. *Stanley*. (3) "Control" as used in *De Beers Consolidated Mines* v. *Howe* (4) means control by directors and is distinguishable from the control arising from a preponderance of votes.

(1) (1789) 3 T. R. 199.
(2) (1845) 7 Q. B. 339, 383.
(3) [1908] 2 K. B. 89.
(4) [1906] A. C. 455.

Inasmuch as this company has its registered office in England, carries on business in England, and has no residence abroad, it is qualified to sue in this country for its trade debts. So far as the Proclamation of September 9, 1914, is concerned, enemy character does not attach to this company. The object of the Proclamation was not to interfere with any business carried on in this country, whether by a company registered here or by a branch of an enemy company. The Trading with the Enemy Act, 1914, s. 1, sub-s. 2, contains a proviso that any transaction permitted by the Proclamation shall not be deemed to be trading with the enemy, and the safeguards imposed by the later provisions of this Act are founded on the assumption that a company in the position of the respondent company is lawfully entitled to carry on its business in this country. Further, the Trading with the Enemy Amendment Act, 1914, s. 14, shows that no company is to be treated as an alien enemy which is not included in the Proclamation. Taking the Proclamation and these Acts together, they amount either to a recognition that this company is not an enemy company or to a licence to the company to carry on its trade. Then the Trading with the Enemy Amendment Act, 1916, gives the Board of Trade complete power of control over businesses carried on here for the benefit of enemy subjects. The Legislature has provided ample safeguards in regard to the trading of these companies, and therefore the case is removed from the need to refer to the common law authorities. But, further, this case is covered by authorities which show that when a question arises as to the character, rights, and obligations of a duly constituted corporation it is not to be determined by reference to the character of the individual corporators: Co. Litt. 129a and b; *Reg.* v. *Arnaud* (1); *Janson* v. *Driefontein Consolidated Mines* (2); *Daniel* v. *Commissioners for Claims on France* (3); *Long* v. *Commissioners for Claims on France.* (4) It is said that, all the corporators being German, a payment to the company would be a payment for the benefit of its corporators, who are alien enemies, and that the company is thereby prevented from suing; but that is opposed to *Amorduct Manufacturing Co.* v. *Defries & Co.* (5) and *The*

(1) (1846) 16 L. J. (Q.B.) 50.
(2) [1902] A. C. 484, 497.
(3) (1825) 2 Knapp, 23.
(4) (1832) 2 Knapp, 51.
(5) (1914) 31 Times L. R. 69.

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Roumanian (1); and on principle it is a fallacy to say that a payment to a corporation is a payment for the benefit of its corporators for the time being. A company is neither the agent of nor the trustee for any of its corporators. Neither the gross nor the net profits are the property of the corporators; they are the assets of the corporation; and when a dividend is declared that merely gives to the corporators a right of action for debt against the corporation. Then it is said that the corporation has ceased to exist or is suspended because there was no sufficient number of corporators qualified to act. But, first, it is not right to say that the corporators are gone or that their rights are extinguished. They are still corporators, and their shares are still vested in them although the particular mode of enjoyment is suspended: *Robson* v. *Premier Oil and Pipe Line Co.* (2) [They also referred to *City of London* v. *Wood.* (3)] Secondly, assuming that there has been a reduction of the corporators below the requisite quorum, that does not ipso facto deprive the company of its existence and of its power to conduct business, though it may be a ground for a winding up: Companies (Consolidation) Act, 1908, ss. 115, 129. [They also contended that, there being nobody who could carry on the business of the company in the prescribed mode, the business must be carried on by the shareholders in general meeting, and, upon the construction of the articles of association, that the secretary, being the only British shareholder, could exercise such powers as the general meeting could exercise; and they referred to *Sharp* v. *Dawes.* (4) This argument is fully dealt with in the judgment of Lord Atkinson.]

As regards the authority of the secretary to instruct the company's solicitor to issue writs in the name of the company, this course of practice had been consistently followed for a long time without any objection from the directors, and in the circumstances the authority ought to be presumed. Further, the objection that the writ was issued without authority must be raised by a motion to strike out the writ, and cannot be raised at the trial as a defence to the action; and this was the view of the Court of Appeal.

Gore-Browne, K.C., in reply referred (upon the main question)

(1) [1915] P. 26.
(2) [1915] 2 Ch. 124.
(3) (1701) 12 Mod. 669.
(4) (1876) 2 Q. B. D. 26.

to *Griswold* v. *Waddington* (1); *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie* (2); *Furtado* v. *Rogers* (3); *Kershaw* v. *Kelsey*. (4)

The House took time for consideration.

June 30. EARL OF HALSBURY. My Lords, I am of opinion that this judgment should be reversed.

In my opinion the whole discussion is solved by a very simple proposition that in our law, when the object to be obtained is unlawful, the indirectness of the means by which it is to be obtained will not get rid of the unlawfulness, and in this cause the object of the means adopted is to enable thousands of pounds to be paid to the King's enemies. Before war existed between us and Germany, an associated body of Germans availed themselves of our English law to carry on a business for manufacturing motor machines in Germany and selling them here in England and elsewhere, as they were entitled to do, but in doing so they were bound to observe the directions which the Act of Parliament under which they were incorporated required.

They were entitled to receive in the shape of dividends the profits of the concern in proportion to their shares in it. They were all Germans originally, though one afterwards became a naturalized Englishman. Now the right and proper course to follow in the matter—and I have no reason to suppose that any other course was followed—was to distribute to them rateably, according to their shares, the profits of their adventure. But this machinery, while perfectly lawful in peace time, becomes absolutely unlawful when the German traders are at war with this country. I confess it seems to me that the question becomes very plain, when one applies the language of the law to the condition of things when war is declared, between the German who is in the character of shareholder and in control of the company. They can neither meet here, nor can they authorize any agent to meet on any company business. They can neither trade with us nor can any British subject trade with them.

(1) (1819) 16 Johns. Sup. Ct. N.Y. 438; Scott's Cases on International Law, 504.

(2) (1916) 32 Times L. R. 299; [1916] 1 K. B. 763.

(3) (1802) 3 Bos. & P. 191.

(4) (1868) 100 Mass. 561.

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Nor can they comply with the provisions for the government of the company which they were bound by their incorporated character to observe.

Under these circumstances it becomes material to consider what is this thing which is described as a "corporation." It is, in fact, a partnership in all that constitutes a partnership except the names, and in some respects the position of those who I shall call the managing partners. No one can doubt that the names and the incorporation were but the machinery by which the purpose (giving money to the enemy) would be accomplished. The absence of the authority to issue the writ is only a part of the larger question. No one has authority to issue a writ on behalf of an alien enemy, because he has no right himself to sue in the Courts of a King with whom his own Sovereign is at war. No person or any body of persons to whom attaches the disability of suing under such circumstances can have authority, and to attempt to shield the fact of giving the enemy the money due to them by the machinery invented for a lawful purpose would be equivalent to enclosing the gold and attempting to excuse it by alleging that the bag containing it was of English manufacture. I observe the Lord Chief Justice says that the company is a live thing. If it were, it would be capable of loyalty and disloyalty. But it is not; and the argument of its being incapable of being loyal or disloyal is founded on its not being "a live thing." Neither is the bag in my illustration "a live thing." And the mere machinery to do an illegal act will not purge its illegality—fraus circuitu non purgatur. After all, this is a question of ingenious words, useful for the purpose for which they were designed, but wholly incapable of being strained to an illegal purpose. The limited liability was a very useful introduction into our system, and there was no reason why foreigners should not, while dealing honestly with us, partake of the benefits of that institution, but it seems to me too monstrous to suppose that for an unlawful, because, after a declaration of war, a hostile, purpose the forms of that institution should be used, and enemies of the State, while actually at war with us, be allowed to continue trading and actually to sue for their profits in trade in an English Court of justice.

My Lords, there are one or two observations which I think it

right to make upon this very singular performance. This is a joint appeal partly upon a judgment under Order XIV., partly upon a cause tried before Lush J. With respect to Order XIV., it is almost ludicrous to treat seriously an order made under such circumstances as these, and that observation is sufficiently proved by the short history of this litigation. The second observation I have to make is that if this question turned only upon the question of the secretary's authority to issue the writ, I should certainly not be contented with the position in which that question was left. In the somewhat flippant evidence given by Mr. Wolter, it was stated that the secretary was given authority, and a minute recorded of the fact; but in the absence of the learned judge some search was made for the minute in question, and no such document could be found. I will say no more, since the witness was not again brought before the learned judge, and therefore had no opportunity of explanation, but I certainly would not act upon evidence such as I have described. I am therefore of opinion that this appeal should be allowed, and I so move your Lordships.

I would like to add that I by no means desire to minimize the value of the weighty judgments to be delivered by your Lordships, but I have thought it important that all may understand the principle that the unlawfulness of trading with the enemy could not be excused by the ingenuity of the means adopted.

VISCOUNT MERSEY. My Lords, I had prepared a judgment expressing my opinion that this appeal ought to be allowed, but since then I have had the opportunity of reading the judgment prepared by my noble and learned friend Lord Parker, and in that judgment my reasons are so fully expressed that I have thought it better to withdraw the judgment I had written.

I am desired to say that Lord Kinnear also had prepared his judgment, but that he will withdraw his judgment in favour of the judgment of my noble and learned friend Lord Parker.

LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Appeal, dated January 19, 1915, affirming an order of Scrutton J., dated November 27, 1914, made in an action brought in the name of the respondent company (a private company) to

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recover from the appellant company on a specially indorsed writ, dated October 23, 1914, a sum of 5605*l.* 16*s.* with interest, the amount due on three bills of exchange drawn by the former company and accepted by the latter. The legal question for decision is whether the order appealed from, made upon additional evidence not before the Master or Scrutton J., is right. I therefore abstain from considering whether, in the events which have happened, this appeal is now necessary for the protection of the appellant company.

On October 30, 1914, the respondents issued a summons pursuant to Order XIV. of the Rules of the Supreme Court for leave to sign final judgment in the action. Affidavits were filed on behalf of both the parties litigant, respectively, in support of and in opposition to the respondents' application. Master Macdonell, upon the affidavits and the documents by them made exhibits of, made the order of November 24, 1914, granting the leave asked for. Presumably, the memorandum and articles of association of the respondent company were brought before the Master and examined by him, as they should have been, although this does not appear on the face of the proceedings. On appeal from this order by the appellant company, Scrutton J., presumably on the evidence before the Master, made the order already mentioned, dismissing the appeal and upholding the order of the Master. The appeal in this case was heard in the Court of Appeal, together with an appeal raising somewhat the same questions arising out of an action brought by the present respondents against a third company, Thomas Tilling, Limited, tried before Lush J. without a jury. It does not appear from the appendix what were the particular issues raised in that action, but it certainly would appear that not only was the evidence given in it by one of the plaintiffs' witnesses, the secretary, referred to and relied upon by the Lords Justices in the appeal in the present case, but the findings of the learned judge at the trial were apparently also relied upon against the present appellants as if they had been parties to the suit in which those rulings were made. The evidence of the secretary was, however, much relied on by both sides in argument before your Lordships. Strange as it may appear, the minute-book of the company, showing, presumably, from what centre the business of the company was managed and

directed, was not given in evidence before any one of the three tribunals. The embarrassing and, as I think, rather unfortunate result of this omission is that the full facts, showing in what country, England or Germany, lay the real business centre from which the governing and directing minds of the company operated, regulating and controlling its important affairs, were, save so far as revealed in the evidence of its secretary, never disclosed. These are, however, the very things which, for the purpose of income tax at all events, have been held to determine the place of residence of a company like the respondent company, so far as such a fictitious legal entity can have a residence: *De Beers Consolidated Mines* v. *Howe* (1); and I can see no reason why, for the purpose of deciding whether the carrying on by such a company of its trade or business does or does not amount to a trading with the enemy, they should not equally determine its place of residence.

It is well established that trading with the most loyal British subject, if he be resident in Germany, would, during the present war, amount to trading with the enemy, and be a misdemeanour if carried on without the consent of the Crown; the reason being that the fruits of his action result to a hostile country and so furnish resources against his own country: *M'Connell* v. *Hector* (2) and *Janson* v. *Driefontein Consolidated Mines.* (3) The same principle would presumably apply to a trading company resident in an enemy country. It would certainly appear to me, therefore, that, having regard to the issue raised in this suit, the residence of the respondent company was of necessity a vital matter for consideration. During the argument a passage was read out from the shorthand writer's notes of the argument before the Court of Appeal, from which it appeared that Mr. Gore-Browne, the leading counsel for the Daimler Company, admitted that the residence of the respondent company was in England. He could not well do otherwise, since the company was registered and incorporated in England, and all the facts going to show where it really resided were, with the exception already mentioned, shut out from the view of the Court. It by no means follows, however, that, despite that admission of counsel, your Lordships could not, if sufficient facts

(1) [1906] A. C. 455. (2) 3 Bos. & P. 113.
(3) [1902] A. C. 484, 505.

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were disclosed in evidence before you, hold that the residence of the company was not in England, but, in truth, in Germany.

In *Crump* v. *Cavendish* (1) Thesiger L.J., dealing with the above-mentioned Order XIV., said: "He (the judge) has to form an opinion as to the facts before him, and he is to stay his hand only if he is satisfied that the defendant has a good defence on the merits, or thinks the facts disclosed by the defendant sufficient to entitle him to be permitted to defend the action." I turn now to the affidavits and documents before the Master and Scrutton J. to consider whether the facts therein disclosed were sufficient to entitle the appellant company within this rule to be permitted to defend the action brought against them. What are those facts? They are:

(1.) That the 25,000 shares into which the capital of the company is divided are held by five individuals and a joint-stock company called the parent company; that this company, incorporated and resident in Hanover, holds 23,398 of these shares; that the three individuals, who hold between them 1600 shares, are all German subjects resident in Hanover; that the two remaining shares are held, one by the secretary, Hans Frederick Wolter, and one by the managing director, Paul Scharnhost Brodtmann, both according to the list of shareholders having residences in England.

(2.) That the directors, three in number, excluding the managing director, are also German subjects resident in Hanover.

(3.) That, with the exception of the secretary, all the directors and shareholders are German subjects; that the secretary is also a German, but, unlike the others, took out naturalization papers on January 1, 1910.

(4.) That the appellant company were ready and willing to pay the amount sued for on two conditions—first, that in doing so they were not acting in contravention of the provisions of the Trading with the Enemy Act, 1914, and, second, that the respondent company were entitled to institute this action, and were also able to give a good and valid discharge for the amount claimed (see affidavit of Oscar Tooley, paragraph 11).

(5.) That it is averred in the 10th and 12th and 13th paragraphs of the same affidavit that the so-called parent company controlled

(1) (1880) 5 Ex. D. 211, 214.

the respondent company; that the former and all the officers of the latter are alien enemies; that alien enemies who were officers or agents of the company were incapable of acting either in the name of, or on behalf of, the company, or individually; that the appellant company were advised and believed that the respondent company were incapable of instituting proceedings or giving receipts for sums due to them, or doing any of those acts which must be done through agents or officers, unless and until agents and officers who were not alien enemies had been appointed; that for these reasons the proceedings were wrongly instituted; and that unconditional leave to defend should be given.

Well, this affidavit distinctly challenged the right of the respondent company, or any of its officers acting on its behalf, to institute the present action, or to give a valid discharge for the amount claimed by it. Their secretary filed an affidavit in reply. He contented himself with asserting that his company is an "English company, being registered at Somerset House under the Companies (Consolidation) Act of 1908, and that he himself is a British subject, having been naturalized on January 1, 1910." He adds lengthy paragraphs relative to his dealings with the Committee on Trade, with sales made to the War Office, with the payments made to his company by some others of its creditors, but not a word as to the place from which its important business was conducted, or from which its action was directed by its governing minds, and not a syllable as to his ever having been authorized by the directors, or any of them, or any person connected with the company, to institute actions of any kind on its behalf. This, if ever, was the time for him to have disclosed the fact that he was clothed with authority to bring this action, if the fact were so. In my view his silence, on the assumption that he had the authority, is inexplicable. It was greatly pressed in argument that Lush J. had, in the action tried before him, come to the conclusion that the secretary was a truthful, though a forgetful and inaccurate, witness, and also that he had authority to institute the suit against Thomas Tilling, Limited. Well, I have the utmost confidence in any conclusion at which that learned judge would arrive on the evidence given before him. These affidavits were, as I understand, not before him, and it is, in my view, quite unjust to press against the appellant company the conclusions

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arrived at by Lush J. without the light which this unaccountable reticence throws on the secretary's character and veracity.

Before dealing with the articles of association, which are by s. 14 of the Act of 1908 made binding on the respondent company, I turn to the evidence given by the secretary in the action against Thomas Tilling, Limited. In my view it tells against rather than in favour of the respondent company in the present proceeding, for, first, it establishes that Brodtmann, the managing director, who is admittedly a German, was not resident in England when the witness gave his evidence; that none of the directors have been in England since the war commenced; that he, the secretary, has not had any communication whatever with any of them since then, and that he had not the express consent of the board of directors to issue the writ in the present case. The secretary is, therefore, the only shareholder who is not an alien, and the only shareholder now resident in this country. The business of the company in England is managed by himself and two managers named Hootton and Jurgenson. He states that he has full powers to commence actions by issuing writs whenever he thinks fit, without consulting the directors; that he got those powers when he was appointed secretary; that there was then a minute made allowing him to issue writs without consulting anybody: authorizing him to represent the company in all its proceedings. The learned judge suggested that the minute-book should be sent for, as he desired to see it. Mr. Leslie Scott then put the questions: "Do you suggest that you have power under this minute to start legal proceedings in England, even when the board of directors are here?" And the witness replied, "Yes, of course." "And even when the managing director is in England?" Answer, "Oh, yes, of course." The minute-book was brought into Court. It was never examined thoroughly, but it showed that there was a minute appointing him secretary, but saying nothing about his duties. No power at all was given to him by minute or resolution relative to litigation, save possibly in reference to bankruptcy proceedings,—no power whatever to bring actions in general.

An effort was made in re-examination to rehabilitate this gentleman by asking him if he gave instructions for the issue of writs, and whether, if actions were in consequence instituted, it was ever

suggested by his board, the managing director, or any other director that he in so doing exceeded his powers. This might possibly be relevant if the question for decision was whether the company had not held out the secretary to third parties as possessed of these powers in such a way as to estop them, as against those parties, from repudiating the secretary's authority. But that is not the question for decision. It is no doubt true that when a secretary of a company is found doing certain things in the name of and on behalf of his company which could legally be authorized, and no resolution or minute is proved authorizing him to do those things, the maxim " omnia praesumuntur rite esse acta " will be applied, and the necessary authority will be presumed to have been lawfully given to him. This maxim cannot, I think, be legitimately applied where the agent vouches a particular document as the source of the authority he claims to exercise, and it is found that the document when produced gives him no such authority. It cannot be presumed he got the authority by means he has on oath repudiated. His oath rebuts the presumption. It is necessary to examine in some detail the articles of association, because it was solemnly and persistently argued, amongst other things, that owing to the fact that all the shareholders of the company, other than the secretary, have become alien enemies, he himself, by virtue of his ownership of one share, became, as I understood, while the war continued, the legal entity, the company, or the whole body of the shareholders combined; that he could hold a general meeting himself, take the chair himself over himself, as chairman put any question to himself, decide upon that question by a show of his own hands, and otherwise comply with the requirements of the 62nd and several other of the articles of association. There is no provision in the articles for the appointment of the first body of directors; consequently they must, under Table A, clause 68, be appointed by a majority of the subscribers to the memorandum of association, subsequent vacancies being filled up by the shareholders in general meeting (article 58), or in the case of casual vacancies by the directors themselves (article 80). The management of the company is vested in the directors (article 102). All orders made by the directors or committees of directors, all appointments of officers, all resolutions and proceedings of general meetings and of meetings of the directors and

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committees, are to be entered in books provided for the purpose (article 108). The number of directors until altered by an extraordinary resolution passed at a general meeting is to be not less than two or more than five. The qualification of every director other than a managing director is the holding of 100 shares ; that of a managing director is such as the directors may determine (articles 76 and 78). The managing director is to be appointed by the directors out of their own body (article 91). At the meetings of the directors two constitute a quorum. The shares of the company are to be under the control of the directors, and certificates of title to the shares must be sealed and signed by two directors and countersigned by the secretary or some other person appointed by them (article 13). The directors are to provide for the safe custody of the seal, the affixing of which must be attested by two of them and the secretary. They are to convene general meetings at least once each year at such time and place as they may determine, and cause notice thereof to be given to all the members. Two members personally present at these meetings constitute a quorum (article 59), and under s. 129 of the Act of 1908 the company is to be wound up, no matter how solvent or successful, if its members are reduced below two.

Article 61, taken in conjunction with article 59, is much relied upon by the respondent company. It provides that in the case of a meeting not convened by requisition, if within half an hour from the time appointed for the meeting a quorum be not present, the meeting is to stand adjourned till that day week, at the same time and place, and if at the adjourned meeting a quorum be not present the members who are present shall be a quorum and may transact the business for which the meeting was called. This, it is insisted, shows that one member may constitute a general meeting, because, although the word " members " is used in the article in the plural, the definition clause (article 1) provides that words importing the singular only include the plural, and vice versa. There are several answers to this contention. The first is that article 1 does not provide absolutely that the singular number is always to include the plural and vice versa, but is only to do so where there is nothing in the subject or context inconsistent therewith ; and, second, that the succeeding article prescribing what is to be done at the meeting

deals with a member or members who may be present not personally but by proxy, as do also articles 63 and 68. The article, in my opinion, obviously means this, that if there be one member personally present, he and the member or members present by proxy may proceed to transact the business. The subject and the context are inconsistent with any other meaning of the word "members." And, of course, the point remains that the time and place of meeting must be fixed by the directors. Apart, then, from the question of delegation to be hereafter considered, it would appear to me to be impossible for the business of the company to be carried on in the manner prescribed by the articles either where the directors of the company have ceased to exist, or, as in this case, where, admittedly, by reason of their becoming alien enemies their rights, powers, and duties are suspended and in abeyance. Though it is necessary in this case that the directors should be shareholders, it is not necessary in every case that they should be so, and it may well be that where this latter is the case the business of the company might be carried on while, as is contemplated in s. 115 of the Act of 1908, there was only one shareholder. Again, it may well be that if there remained a number of shareholders, not being alien enemies, sufficient to re-elect directors not alien enemies, and so set up again in accordance with the articles an organization for the control and management of the company's affairs, its business might legitimately be carried on, but such a residue of shareholders does not exist in the present case. And whatever else one shareholder may be, he cannot be two directors. The directors of a company, said Lord Cairns in *Ferguson* v. *Wilson* (1), "are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent." Well, on the outbreak of the war those agents in this case became incapable of acting for their principal, though that principal might continue to exist: *Ex parte Boussmaker* (2); *Esposito* v. *Bowden* (3); *Janson* v. *Driefontein Consolidated Mines.* (4) And if a company should not have, and not be able lawfully to appoint, any directors other than alien enemies, then, though the legal entity, the company,

(1) (1866) L. R. 2 Ch. 77, 89.
(2) (1806) 13 Ves. 71.
(3) (1857) 7 E. & B. 763.
(4) [1902] A. C. 484.

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might continue to exist, its action in its trade in this country would be paralysed in point of law, the status of its agents as distinct from that of its shareholders rendering it incapable of making any contract. If while the directors could act they delegated to the secretary power to institute what actions he pleases, then he would, I think, continue, despite the suspension of their powers, to be the agent of the company—not of the directors—for the purposes of that delegation. And as the writ in this action was issued in the month of October, 1914, it is, in my opinion, only under and by virtue of that delegation, if at all, he could have got power to institute this action.

There is no evidence whatever that his mere appointment as secretary conferred this authority upon him. Under article 102, sub-section 17, the directors are empowered "(1.) To institute, conduct, defend, compound, or abandon any legal proceedings by or against the company or its officers, or otherwise concerning the affairs of the company; (2.) to compound and allow time for payment or satisfaction of any debts due, and of any claims or demands by or against the company." Well, according to his evidence, the directors, when he was appointed by minute, practically substituted him for themselves for the purposes of this article. As to the matter mentioned in No. 1, he did not expressly state that he had authority to give receipts for sums sued for, or as to all or any of the things mentioned in the second number of this section. If the directors had desired to clothe him with the vast and compromising powers he claims, it is strange they did not appoint him by power of attorney their attorney under article 106. It is admitted they did not do so. It is article 102, section 15, that is relied upon on this point. That enables the directors "to appoint, and at their discretion to remove, or suspend such managers, secretaries, officers, clerks, agents, and servants for permanent, temporary or special services as they may from time to time think fit, and to invest them with such power as they may think expedient, and to determine their duties and fix their salaries or emoluments and to require security in such instances, and to such amounts as they think fit." This provision would rather look as if it contemplated the investiture of the officers with the powers it was designed to give them on the occasion and at the times of their respective appointments. And this was evidently the idea in the

mind of the secretary when he deposed that the powers he claimed were conferred upon him by minute when he was appointed; but I do not think this provision of the section prohibits an increase of powers and duties after appointment. Now as to the proof of the delegation. There is not a scrap of writing of any kind given in evidence in this case to prove that any power to institute actions or give receipts for money recovered was ever conferred upon the secretary. The only document he referred to as conferring it upon him contradicts every statement made by him on the point. It seems incredible that he ever was clothed with the power, without consulting his directors or managing directors, to institute in the name of the company any actions of any kind he pleased. There is no proof other than his own testimony that he ever instituted any action or gave instructions for its institution. If the directors were in England when he did so, they could, of course, ratify and adopt his act. Not so now. The burden of proving that the secretary had power and authority to institute the present action some months after the outbreak of the war rested on the respondent company. I am clearly of opinion that they have not discharged that burden. I do not think Lush J. had evidence before him sufficient to support his finding on this point; but, even if I thought otherwise, I should still hold that, in the absence of a clear consent to be bound by his findings thus come to in a suit to which the appellants were no parties, that finding was not binding upon them. I do not find any clear consent of that kind in the present case. I think this appeal should be allowed. Having formed this opinion, I do not desire to express any opinion on the other and main point raised in the case further than to say that, the question of residence of the company apart, I do not think that the legal entity, the company, can be so completely identified with its shareholders, or the majority of them, as to make their nationality its nationality or their status its status, or it an alien enemy because they are alien enemies, or to give it an enemy character because they have that character. I think the judgment of Lord Macnaghten in *Janson* v. *Driefontein Consolidated Mines* (1) is inconsistent with any such view. Speaking of a Transvaal company he said: "If all its members had been subjects of the British

(1) [1902] A. C. 497.

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Crown the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien." I think it is much to be regretted that the appellent company were not permitted to defend, as in my opinion they should have been, so that all the facts might have been elicited, and it could be determined whether the company resides and trades in Germany or not.

I think the order suggested by my noble and learned friend Lord Parker should be made.

LORD SHAW OF DUNFERMLINE. My Lords, the Daimler Company is indebted to the Continental Company in certain sums of money. It was willing to pay these sums if payment could have been made with safety. The Continental Company took legal proceedings to recover the moneys. To these proceedings the Daimler Company tabled two defences. The first is that payment would be of the nature of trading with the enemy, and the second is a challenge of the authority to institute the action.

Upon the first point I am of opinion that the judgment of the Court of Appeal is right. Upon the second point, and with regret, I am of opinion that it is erroneous.

The first point is of much general importance: it was carefully and anxiously argued. My views upon it in its general aspect and apart from the statutes and Proclamations,—which were the subject of a keen analysis and which are afterwards referred to,—may be expressed in the following propositions. Before stating these, however, I may be allowed to say, my Lords, that I have found myself to be in substantial agreement with my noble and learned friend Lord Parmoor in the judgment about to be pronounced by him, supported—as in my humble opinion it is—by the authorities which he has cited and which I do not here repeat.

(1.) There is no debate at this time of day on the general proposition that the direct and immediate consequence of a declaration of war by or against this country is to make all trading with the enemy illegal. The proposition was dealt with recently in this House in the case of *Horlock* v. *Beal*. (1) War is war, not between Sovereigns or Governments alone. It puts each subject of the one

(1) [1916] 1 A. C. 486.

belligerent into the position of being the legal enemy of each subject of the other belligerent; and all persons bound in allegiance and loyalty to His Majesty are consequently and immediately, by the force of the common law, forbidden to trade with the enemy Power or its subjects.

(2.) This obligation and restraint is binding in every sense. It is, therefore, no defence to a breach of the duty to forbear from trading with the enemy that the act was done, not for personal benefit or advantage, but in the service or under the agency or orders of another who is not so bound. No one subject to the laws of this country could be permitted to escape from obedience thereto by pleading that he was acting merely as the hand of others, say a German, Austrian, or Turkish company. The prohibition against trading is binding in regard to all action direct or indirect, personal or representative.

(3.) In so far as the obligation and restraint imposed by the common law are rested upon the allegiance or loyalty of the subject the application of such ideas to a limited company is incongruous; allegiance and loyalty are personal, by the nature of the case. An incorporated company cannot with propriety have such terms applied to it as if it were a mind subject to emotions or passions or a sense of duty. It is a creation of the law convenient for the purposes of management, of the holding of property, of the association of individuals in business transactions—in short for all the purposes and with the limitations and remedies set forth in the Companies Acts.

(4.) Once, however, it is clear that, although this may be so under proposition 3, yet under proposition 2 every individual subject to the common law is inhibited and interpelled from trading with the enemy, then trading with the enemy on behalf of a company is just as much prohibited as personal trading. A limited company, incorporated in England and although English as regards all the results which flow from such incorporation, is thus completely barred by the Trading with the Enemy Acts—not by reason of the company's allegiance or loyalty, but by reason of the fact that there is no human agency possible within the realm through which, and within the law, trading with the enemy could be accomplished. In obedience to that law all trading with the enemy, direct or

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indirect, stops; no firm or company wheresoever or howsoever directed can so trade, nor can anything be negotiated or transacted for it through any person or agency in this country.

(5.) Transactions and trading require two parties, and the same principle applies to trading by the enemy as to trading with the enemy. In this way: A company registered in Britain may have shareholders and directors who are alien enemies. Transactions or trading with any one of them becomes illegal. They have no power to interfere in any particular with the policy or acts of companies registered in Britain; alien enemy shareholders cannot vote; alien enemy directors cannot direct; the rights of all these are in complete suspense during the war.

(6.) As to shareholders or directors who are not alien enemies, they stand pendente bello legally bereft of all their coadjutors who are. And, if the company be a company registered in Great Britain, they must face the situation thus created by adopting the courses suitable either under the Companies Acts or the recent legislation. In this way, while no payments of assets, dividends, or profits can be made to alien enemy shareholders, yet the property and business of the company may be conserved. There may be loss consequent on commercial dislocation, but neither loss nor forfeiture is imposed by the law. The law is completely satisfied if in the conduct and range of the business trading with the enemy is avoided. To put in a word one plain instance: All British trading by the company is still permitted if there are British shareholders who can carry it on.

With much respect I see no advantage to be gained, but much confusion to result, from proceeding to a further stage and treating or even characterizing British registered companies as either alien enemies or companies with an alien enemy character. As stated, all the enemy shareholders' rights being placed in suspense and all trading with these shareholders or with any other enemy being interpelled, there is no principle of law which would, in my humble opinion, justify the incongruity of denominating or regarding the company itself as enemy either in character or in fact.

Much of the discussion at your Lordships' bar—probably the major part of it—had reference to the recent legislation. This was minutely and anxiously analysed. My Lords, I think it neces ary

accordingly to deal with it; but I may say at once that I do not think that it invades or varies any of the principles which I have humbly ventured to sketch.

The question, however, with whom this trading is forbidden is one of wide and serious importance. So much of the commerce of the country is now carried on by incorporated companies that it is manifestly critical for the citizen to know what is the scope of the term "enemy" and if it can apply to such companies, and, if so, to which of them. This is all the more so because the legislation upon the subject almost at its opening creates trading with the enemy a misdemeanour. The obligation under the common law is backed by criminal sanction. Once such a statute is passed it would of course not be open to any citizen to plead his ignorance of the law of the land as a defence against the charge of misdemeanour. This, however, my Lords, makes it clear that Courts of law should give a strict interpretation to statutory provisions of this character —an interpretation which in any case of dubiety or ambiguity shall be favourable to the liberty of the subject.

Speaking for myself, I do not find that the Trading with the Enemy Acts and Proclamations now to be considered were such as to leave any substantial doubt in the mind of the citizen as to what should be his attitude with regard to incorporated companies.

By the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), it was provided, s. 1, sub-s. 2: "For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy:

"Provided that any transaction or act permitted by or under any such Proclamation shall not be deemed to be trading with the enemy."

My Lords, there was much discussion as to this proviso. It appears to me to be a proviso applicable to the whole of the subsection, and, if so, applicable to all transactions or acts of trading which either by common law or by this or any other statute constitute trading with the enemy. This, in my view, is equivalent to a

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statutory declaration that every transaction or act permitted under Proclamation shall, notwithstanding all such common law or statutory prohibitions, not be deemed to be trading with the enemy. I look upon this statute as one for direction and guidance; and it does not appear to me legitimate to contend that the direction and guidance were not of this character—that if a thing was permitted by a Proclamation it was not trading with the enemy or a contravention of the law.

The statute was dated September 18, 1914; and the question accordingly is, What did the Proclamation then in force, namely, that of date September 9, provide? It provided, art. 5: "From and after the date of this Proclamation the following prohibitions shall have effect, (save so far as licences may be issued as hereinafter provided), and we do hereby accordingly warn all persons resident, carrying on business or being in our Dominions:

"(1.) Not to pay any sum of money to or for the benefit of an enemy."

There occurs in art. 3 of the Proclamation a definition of enemy. It is as follows: "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country."

My Lords, it appears to me that this was a plain guide and instruction to persons in the position of the appellants. They were told, first, that a transaction permitted under the Proclamation should not be deemed trading with the enemy; secondly, that in the case of incorporated bodies enemy character attached to those incorporated in an enemy country, but thirdly, that it attached only to those. I think, in short, that it was a very plain intimation that if a company was not incorporated in an enemy country, but was incorporated in our own country, then this was, though negatively expressed, the exact case in which a payment to such a company became unexceptionable and legitimate.

It is not to be forgotten, my Lords, that under the very same

statute provisions were enacted to cover the case of companies whose share capital or directorate was either wholly or in certain proportion held by alien enemies. By s. 2, sub-s. 2, for example, in the case of such companies, when a third or more of the issued share capital or the directorate was so held, the Board of Trade might obtain authority to inspect the books, &c., and appoint an inspector. By s. 3 further cautionary provisions were made giving to the Board of Trade power to apply to the Court for the appointment of a controller. So that—to carry the legislation no further than the one Act of Parliament referred to—it was clear that the case of companies held by a majority or even by a minority of alien enemies was put under surveillance to such an extent that payments made or transactions carried on with such a company in this country would have been under official inspection. It appears to me to be a somewhat strong proposition under these circumstances to hold that one is entitled to go behind the English incorporation of the company and to declare that all these statutory stipulations were vain, seeing that such a company was an enemy, to trade with whom, directly or indirectly, was a misdemeanour.

Further, it appears to me to be equally unsound for a Court of law to announce that, notwithstanding all those statutory provisions, the law of the land is such that the shareholding of a company incorporated in England has to be investigated, and trading with it is forbidden, if the substantial majority of shares is found to be, say, German. Such an operation would write out a large portion of the statute. It would render meaningless the particular proviso which declared that enemy character attached only to companies incorporated in an enemy country. It is also fairly clear that, under the word "substantially," every kind of inquiry would have to be made in individual instances—say, for instance, as to whether there were enough of alien enemy shareholders to make it an alien enemy company; as to whether a majority would determine the matter, with the possible result of seriously injuring large minorities of British shareholders; and, indeed, whether a company whose shares might be transferred from day to day stood to change into and out of its character as an alien enemy in consequence of the change of personnel in its shareholders. My Lords, such results would necessarily follow from upsetting the plain announcement of the statute

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which makes British incorporation settle high or low that the company so incorporated is not "enemy."

My Lords, what happened in the present case? Under the statute the Board of Trade did appoint an inspector. Since the beginning of August—that is, since the war broke out—that inspector has initialled all the cheques given by the company. The company has two banking accounts, into one of which moneys received are paid. When the company receives a sum of money it gives a receipt, and that receipt goes through the hands of the inspector, so that he knows exactly the details. The inspector has charge of the bank account and the company is not able to pay any money to the shareholders. The fact is that all these shareholders are Germans except one; but not one of these shareholders can receive under such a régime, and during the war, any part of the assets, dividends, or profits of this concern. The company has, however, a stock of rubber goods. I put to the learned counsel for the appellants what would be the result of the argument with regard to such stock. He replied that it could not be dealt with. To the further question, "if the stock were perishable?" he replied in effect that it must perish. I think that this was a perfectly logical result; but it appears to confirm the view that the argument itself was unfounded either upon the general law of the case or upon the legislation to which I have referred.

I do not detain your Lordships with what I think to be the extraordinary argument that if assets are realized and a business kept up, enemy shareholders of an English company will, at the end of the war, be benefited. Possibly they may. It is true enough that on the other argument both they and the English shareholders might enormously suffer: so that a species of indirect pillage seems to be involved—pillage first of the enemy and secondly of English shareholders—thus presumably penalized for their association with others. I must respectfully decline to admit the validity of any argument of the kind.

I may, however, further point out that if the statute and Proclamation be construed as the Court of Appeal have, I think, very rightly construed them, the results post bellum would be results depending upon the state of British legislation and of the terms of peace. So far as British legislation is concerned, it may be mentioned that by the Act to amend the Trading with the Enemy Act, 1914 (5 Geo. 5,

c. 12), passed on November 27, 1914 various provisions were made for the constitution of an office of custodian of enemy property, the custodian being appointed to hold such property "until the termination of the present war," and thereafter to "deal with the same in such manner as His Majesty may by Order in Council direct." In short, it seems plain beyond question that under the existing legislation or under future Acts, or as part of a diplomatic settlement after the war, the question of the disposal of enemy property will be fully dealt with. This does not seem to afford any argument in support of its deterioration or destruction, meanwhile, together with the deterioration and destruction of British rights associated with it.

In conclusion—on this head of the case—I may point out that the Act of November just cited provides by s. 14 that it "shall be construed as one with the principal Act"—that is, the Act of September, to which I have referred—and that (2.): "No person or body of persons shall, for the purpose of this Act, be treated as an enemy who would not be so treated for the purpose of any Proclamation issued by His Majesty dealing with trading with the enemy." It is of course true that this Act cannot bind the parties to the present litigation; but it appears to be entirely in accord with the view of the former Act and of the Proclamation of September which has been taken in this opinion. So far as Parliament is concerned the situation is, as stated, that the country of incorporation of the company, if English excludes the company from being either an enemy company or of an enemy character; and that all the provisions relative to the working of a company whose shareholders are mixed are provisions which proceed upon that foundation. I am accordingly of opinion that the official of the Daimler Company, charged with the payment of moneys, who would have ventured to make payment of the debt due by that company to the Continental Company, or to a person properly acting as its representative, would have been safe in doing so and guilty of no misdemeanour. The view taken upon this part of the case by the majority of the Court of Appeal appears to me to be well founded.

My Lords, it is with regret that—this being so—I find myself constrained to concur in the opinion which your Lordships take as to the initiation of these legal proceedings. I think they naturally

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followed as part of a course of previous dealings; and I am not surprised at the view taken by Lush J. in regard to this point. But upon the other hand the point, it is only fair to the appellants to say, has been from the first raised by them. Authority to raise legal proceedings appears to be in the directors who are all Germans, or in some person to whom they delegated the authority. They did not before the war make such delegation of authority to raise these proceedings. Since the outbreak of war it is not, according to my opinion, competent for enemy directors or shareholders to have anything to do with the management of this company's affairs in England. A different course might possibly have been adopted by the single shareholder in England. But the point against agency and authority to take these particular legal proceedings has been taken; and I do not differ from the view of your Lordships that it is well founded. I agree accordingly to the suit being dismissed upon that ground; but, if I may venture to say so, it does not appear to me to be a case in which costs should be awarded, even if such an award could be effective.

LORD PARKER OF WADDINGTON. My Lords, the judgment I am about to read has been prepared with the assistance and collaboration of Lord Sumner, who authorizes me to state that he agrees with it.

My Lords, in my opinion this appeal ought to be allowed.

When the action was instituted all the directors of the plaintiff company were Germans resident in Germany. In other words, they were the King's enemies, and as such incapable of exercising any of the powers vested in them as directors of a company incorporated in the United Kingdom. They were incapable, therefore, of authorizing the institution of this action. The contention that the secretary of the company could authorize such institution is untenable. The resolution by which he was appointed secretary would confer on him such powers only as were incident to the performance of his secretarial duties. It is true that the directors of the company might by a proper resolution in that behalf have conferred on him a power to authorize the institution of proceedings in the company's name, but they did not do so. Their conduct in holding him out as a person having this power, if they in fact

so held him out, may in particular cases have operated to estop the company from denying the authority of a solicitor whom he retained, but it could not confer the power in question.

It follows that this action was instituted without authority from the company, and in my opinion the Court having notice of the fact should have refused relief. It is true that a question whether the plaintiff's solicitor has or has not been validly retained is in general brought before the Court by motion to which the solicitor is made a party. But when the Court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed. It clearly would not do so in the case of an infant plaintiff, and I can see no difference in principle between the case of an infant and the case of a company which has no directors or other officers capable of giving instructions for the institution of legal proceedings. This is more especially so when, by reason of all the shareholders (with one exception) being the King's enemies, no agent or officer capable of giving such instructions can be validly appointed. It was suggested that the secretary, being the only shareholder who is not an enemy, could in some way or other call and hold a meeting of the company at which he might appoint himself to be a director or agent of the company with such powers as he might think fit. He has not attempted to do so, and after a careful examination of the articles I think it reasonably clear that any such attempt would fail. Further, it is quite clear that the articles of association of the company do not contemplate or provide for the continuance of the company's trading without any directors at all, nor is a secretary of a company an official who virtute officii can manage all its affairs, with or without the help of servants, in the absence of a regular directorate.

My Lords, under these circumstances, it is, strictly speaking, unnecessary to consider whether a company incorporated in the United Kingdom can under any and what circumstances be an enemy or assume an enemy character. The question has, however, been so elaborately argued both here and in the Court of Appeal, and is of such general importance, that it would not be right to ignore it.

The principle upon which the judgment under appeal proceeds is that trading with an incorporated company cannot be trading

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with an enemy where the company is registered in England under the Companies Acts and carries on its business here. Such a company it calls an "English company," and obviously likens to a natural-born Englishman, and accordingly holds that payment to it of a debt which is due to it, and of money which is its own, cannot be trading with the enemy, be its corporators who they may. The view is that an English company's enemy officers vacate their office on becoming enemies and so affect it no longer, and that its enemy shareholders, being neither its agents nor its principals, never in law affect it at all.

My Lords, much of the reasoning by which this principle is supported is quite indisputable. No one can question that a corporation is a legal person distinct from its corporators; that the relation of a shareholder to a company, which is limited by shares, is not in itself the relation of principal and agent or the reverse; that the assets of the company belong to it and the acts of its servants and agents are its acts, while its shareholders, as such, have no property in the assets and no personal responsibility for those acts. The law on the subject is clearly laid down in a passage in Lord Halsbury's judgment in *Salomon* v. *Salomon & Co.* (1) "I am simply here," he says, "dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence—quite apart from the motives or conduct of individual corporators. . . . . Short of such proof"—i.e., proof in appropriate proceedings that the company had no real legal existence—"it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the formation of the company are absolutely irrelevant in discussing what those rights and liabilities are." I do not think, however, that it is a necessary corollary of this reasoning to say that the character of its corporators must be irrelevant to the character of the company; and this is crucial, for the rule against trading with the enemy depends upon enemy character.

A natural person, though an English-born subject of His

(1) [1897] A. C. 22, 30.

Majesty, may bear an enemy character and be under liability and disability as such by adhering to His Majesty's enemies. If he gives them active aid, he is a traitor ; but he may fall far short of that and still be invested with enemy character. If he has what is known in prize law as a commercial domicil among the King's enemies, his merchandise is good prize at sea, just as if it belonged to a subject of the enemy Power. Not only actively, but passively, he may bring himself under the same disability. Voluntary residence among the enemy, however passive or pacific he may be, identifies an English subject with His Majesty's foes. I do not think it necessary to cite authority for these well-known propositions, nor do I doubt that, if they had seemed material to the Court of Appeal, they would have been accepted.

How are such rules to be applied to an artificial person, incorporated by forms of law ? As far as active adherence to the enemy goes, there can be no difference, except such as arises from the fact that a company's acts are those of its servants and agents acting within the scope of their authority. An illustration of the application of such rules to a company (as it happens a company of neutral incorporation, which is an a fortiori case) is to be found in *Netherlands South African Ry. Co.* v. *Fisher*. (1)

In the case of an artificial person what is the analogue to voluntary residence among the King's enemies ? Its impersonality can hardly put it in a better position than a natural person and lead to its being unaffected by anything equivalent to residence. It is only by a figure of speech that a company can be said to have a nationality or residence at all. If the place of its incorporation under municipal law fixes its residence, then its residence cannot be changed, which is almost a contradiction in terms, and in the case of a company residence must correspond to the birthplace and country of natural allegiance in the case of a living person, and not to residence or commercial domicil. Nevertheless, enemy character depends on these last. It would seem, therefore, logically to follow that, in transferring the application of the rule against trading with the enemy from natural to artificial persons, something more than the mere place or country of registration or incorporation must be looked at.

(1) 18 Times L. R. 116.

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My Lords, I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitively with enemy character. It seems to me that similarly the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company. If not definite and conclusive, it must at least be prima facie relevant, as raising a presumption that those who are purporting to act in the name of the company are, in fact, under the control of those whom it is their interest to satisfy. Certainly I have found no authority to the contrary. Such a view reconciles the positions of natural and artificial persons in this regard, and the opposite view leads to the paradoxical result that the King's enemies, who chance during war to constitute the entire body of corporators in a company registered in England, thereby pass out of the range of legal vision, and, instead, the corporation, which in itself is incapable of loyalty, or enmity, or residence, or of anything but bare existence in contemplation of law and registration under some system of law, takes their place for almost the most important of all purposes, that of being classed among the King's friends or among his foes in time of war.

What is involved in the decision of the Court of Appeal is that, for all purposes to which the character and not merely the rights and powers of an artificial person are material, the personalities of the natural persons, who are its corporators, are to be ignored. An impassable line is drawn between the one person and the others. When the law is concerned with the artificial person, it is to know nothing of the natural persons who constitute and control it. In questions of property and capacity, of acts done and rights acquired or liabilities assumed thereby, this may be always true. Certainly it is so for the most part. But the character in which property is held, and the character in which the capacity to act is enjoyed and acts are done, are not in pari materia. The latter character is a quality of the company itself, and conditions its capacities and its acts. It

is not a mere part of its energies or acquisitions, and if that character must be derivable not from the circumstances of its incorporation, which arises once for all, but from qualities of enmity and amity, which are dependent on the chances of peace or war and are attributable only to human beings, I know not from what human beings that character should be derived, in cases where the active conduct of the company's officers has not already decided the matter, if resort is not to be had to the predominant character of its shareholders and corporators.

So far as I can find, this precise question has been asked heretofore once and once only, namely, in argument in the case of *Bank of United States* v. *Deveaux*. (1) The judgment of Marshall C.J. did not answer it, though he decided the case in favour of the party whose counsel suggested this point as part of a wider argument. Accordingly all that can be said is that the suggestion cannot have shocked that great jurist, and his actual decision proceeds upon the assumption that for certain purposes a Court must look behind the artificial persona—the corporation—and take account of and be guided by the personalities of the natural persons, the corporators.

In the Court of Appeal the Lord Chief Justice expressed the opinion that the judgment of Marshall C.J. had not been approved in later cases before the Supreme Court of the United States. I have examined the cases in question (*Louisville, Cincinnati and Charleston Rail-road Co.* v. *Letson* (2) and *St. Louis and San Francisco Ry. Co.* v. *James* (3)), and have come to the conclusion that, so far as is material to the question in hand, they do not bear out this criticism. This is how the matter stands. Under the Constitution of the United States jurisdiction is given to Federal circuit Courts to decide controversies between "citizens" of different States. In the case in question Marshall C.J. held that an artificial person could not be a citizen for this purpose, but, not to deny justice to a corporation, he took cognizance of the corporators, and, finding them all to be citizens of the State which had incorporated the plaintiff bank, he admitted jurisdiction, treated the bank like a citizen of that State, and entertained the suit. It was afterwards contended, and for

(1) (1809) 9 U. S. (5 Cranch) 61, 81.
(2) (1844) 43 U. S. (2 Howard) 497.
(3) (1896) 161 U. S. 545.

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some time with success, that this decision applied only when all the corporators were citizens of that State, and that it required a refusal of jurisdiction when some of them were citizens of another State. It was in this stage that he expressed the doubts referred to in the judgment below. Long after his time the matter was at last see at rest in the case of the *St. Louis Railway* (1), when the Court surveyed all the different phases of the controversy. What is remarkable is the way in which this was done. The Federal Courts did not ignore the existence of the corporators and fix their attention on the place where the corporation was chartered, or the State under whose laws it was registered. They continued to fix their attention on the citizen corporators, but they conclusively and incontestably presumed that they were all citizens of the State of the incorporation. Such bearing, therefore, as these cases have on the present question is in favour of the appellants, for it is plain that great judges, trained in the principles of the English common law, have not found it contrary to principle to look, at least for some purposes, behind the corporation and consider the quality of its members. A somewhat similar observation arises upon *Janson* v. *Driefontein Consolidated Mines.* (2) The question fought throughout in that case was whether it was against public policy for English underwriters to indemnify a company, registered in the Transvaal, against losses inflicted upon it just before the outbreak of war by the Government of the South African Republic in order to strengthen its resources in the impending conflict with this country. The case was tried before the conclusion of peace, but on the common footing that it should be taken that the war was over. The mere suspension of an enemy's right of suit during war never was relied on at all, and the plea that payment on the policy would be an act of trading with the enemy was dropped. The only case made was that payment would relieve enemies of the Crown from losses which the public policy of this country, applicable to war and warlike conditions, required that they should bear themselves. It was the underwriters who insisted on the enemy character of the company, for the company itself denied it. As I read the judgments of the noble Lords, none purported to decide that the company must be an enemy corporation for all purposes by reason of its registration in the

(1) 161 U. S. 545. (2) [1902] A. C. 484.

Transvaal. They held that even if that assumption were made in the underwriters' favour, yet their appeal must fail. The Lord Chancellor expressly stated that the question might be debateable, as it is now actually being debated, and other noble Lords concurred. Lord Lindley, whose observations alone are expressed at length, could not, I think, have meant to intimate thereby that, in such a case as the present, he would decide for the respondents. What really is significant in that case is this: few, if any, of the shareholders in the company were in fact subjects of the South African Republic. The vast majority were subjects of various European States. The company's argument was, "How can it be contrary to British public policy that individual Frenchmen and Germans or Italians should get the practical benefit of this policy?" In the Court of Appeal (1) Sir A. L. Smith M.R. expressly accepted this argument. To him at least there was no impenetrable screen, interposed by registration, between the company and its shareholders. Beyond this I think for present purposes the case does not go. Further, the cases of the English Roman Catholic colleges in France, cited to your Lordships from 2 Knapp, pp. 23 and 51, do not seem to me to be in point. They turn on the meaning to be attributed to the expression "British subjects" in a particular treaty. If anything, the reliance placed on the fact of the French Government's control over the colleges and on the existing state of English legislation towards Roman Catholic ecclesiastics would militate against the respondents' argument. As an illustration of the view which has been taken (under the Income Tax Acts it is true) of the control which one trading company exercises over another company through the ownership of a controlling interest in the latter's shares, I would refer to *St. Louis Breweries* v. *Apthorpe* (2) and *Apthorpe* v. *Peter Schoenhofen Brewing Co.* (3) In the latter case, in deciding that an English company, which held a controlling interest in the shares of a United States company, carried on business for income tax purposes in the United States by virtue of that holding and of its control over the business of the latter company, Collins L.J. expressly said that he was not deterred from so deciding by the decision of your Lordships' House in the case of *Salomon* v. *Salomon &*

(1) [1901] 2 K. B. 419. (2) (1898) 79 L. T. 551.
(3) (1899) 80 L. T. 395.

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Co. (1), which was so much relied on in the Court below. I think this analogy not without importance. In the case of *The Roumanian* (2) it is to be remembered that the Prize Court was dealing with a matter in which the enemy character of goods is by settled rule determined by ownership, and when that case was affirmed in the Privy Council no decision on this point was invited or given.

My Lords, the truth is that considerations which govern civil liability and rights of property in time of peace differ radically from those which govern enemy character in time of war. Joint-stock enterprise and English legislation and decisions about it have developed mainly since this country was last engaged in a great European war and have taken little, if any, account of warlike conditions. The ideal of joint-stock enterprise, that with limited liability the more unlimited the trading the better, is an ideal of profound peace. The rule against trading with the enemy is a belligerent's weapon of self-protection. I think that it has to be applied to modern circumstances as we find them, and not limited to the applications of long ago, with as little desire to cut it down on the one hand as to extend it on the other beyond what those circumstances require. Though it has been said by high authority (see *M'Connell* v. *Hector* (3) and *Esposito* v. *Bowden* (4)) to aim at curtailing the commercial resources of the enemy, it has, according to other and older authorities, the wider object of preventing unregulated intercourse with the enemy altogether. Through the Royal licence, which validates such intercourse and such trade, they are brought under necessary control. Without such control they are forbidden. To my mind the rule would be deprived of its substantial justification, and be reduced to a barren canon, if it were held, in circumstances such as these, that it had no application by reason of the mere fact that the company is registered in London.

My Lords, having regard to the foregoing considerations, I think the law on the subject may be summarized in the following propositions :—

(1.) A company incorporated in the United Kingdom is a legal

(1) [1897] A. C. 22. 124.
(2) [1915] P. 26; [1916] 1 A. C. (3) 3 Bos. & P. 113.
(4) 7 E. & B. 763, 779.

entity, a creation of law with the status and capacity which the law confers. It is not a natural person with mind or conscience. To use the language of Buckley L.J., "it can be neither loyal nor disloyal. It can be neither friend nor enemy."

(2.) Such a company can only act through agents properly authorized, and so long as it is carrying on business in this country through agents so authorized and residing in this or a friendly country it is prima facie to be regarded as a friend, and all His Majesty's lieges may deal with it as such.

(3.) Such a company may, however, assume an enemy character. This will be the case if its agents or the persons in de facto control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy.

(4.) The character of individual shareholders cannot of itself affect the character of the company. This is admittedly so in times of peace, during which every shareholder is at liberty to exercise and enjoy such rights as are by law incident to his status as shareholder. It would be anomalous if it were not so also in a time of war, during which all such rights and privileges are in abeyance. The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the company's agents, or the persons in de facto control of its affairs, are in fact adhering to, taking instructions from, or acting under the control of enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holdings. The fact, if it be the fact, that after eliminating the enemy shareholders the number of shareholders remaining is insufficient for the purpose of holding meetings of the company or appointing directors or other officers may well raise a presumption in this respect. For example, in the present case, even if the secretary had been fully authorized to manage the affairs of the company and to institute legal proceedings on its behalf, the fact that he held one share only out of 25,000 shares, and was the only shareholder who was not an enemy, might well throw on the company the onus of proving that he was not acting under the control of, taking his

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instructions from, or adhering to the King's enemies in such manner as to impose an enemy character on the company itself. It is an a fortiori case when the secretary is without authority and necessarily depends for the validity of all he does on the subsequent ratification of enemy shareholders. The circumstances of the present case were, therefore, such as to require close investigation and preclude the propriety of giving leave to sign judgment under Order XIV., r. 1.

(5.) In a similar way a company registered in the United Kingdom, but carrying on business in a neutral country through agents properly authorized and resident here or in the neutral country, is prima facie to be regarded as a friend, but may, through its agents or persons in de facto control of its affairs, assume an enemy character.

(6.) A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy.

My Lords, the foregoing propositions are not only consistent with the authorities cited in argument, and in particular with what was said in this House in *Janson* v. *Driefontein Consolidated Mines* (1), but they have, I think, the advantage of affording convenient and intelligible guidance to the public on questions of trading with the enemy. It would be a misfortune if the law were such that during war every one proposing to deal with a British company had to examine the character of its shareholders and decide whether the number of the enemy shareholders coupled with the value of their holdings were such as to impose an enemy character on the company itself. It would be still more unfortunate if this question were a question for the jury in each particular case. No one could maintain that a company had assumed an enemy character merely because it had a few enemy shareholders. It might possibly be contended that it assumed an enemy character when its enemy shareholders amounted to (say) one-half, three-fifths, or five-eighths of the whole, but how if the one-half, three-fifths, or five-eighths held only one-sixth, one-fifth, or one-fourth of the shares ? The Legislature might, but no Court could possibly, lay down a hard and fast rule, and, if no such rule were laid down, how could any one

(1) [1902] A. C. 484.

proposing to deal with the company ascertain whether he was or was not proposing to deal with the enemy ?

My Lords, I desire to add this. It was suggested in argument that acts otherwise lawful might be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war was over. I entirely dissent from this view. I see no reason why a company should not trade merely because enemy shareholders may after the war become entitled to their proper share of the profits of such trading. I see no reason why the trustee of an English business with enemy cestuis que trust should not during the war continue to carry on the business, although after the war the profits may go to persons who are now enemies, or why moneys belonging to an enemy but in the hands of a trustee in this country should not be paid into Court and invested in Government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. In early days the King's prerogative probably extended to seizing enemy property on land as well as on sea. As to property on land, this prerogative has long fallen into disuse. Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war. In the meantime it would be lamentable if the trade of this country were fettered, businesses shut down, or money allowed to remain idle in order to prevent any possible benefit accruing thereby to enemies after peace. The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes.

I need only briefly refer to the argument submitted on the effect of the recent statutes against trading with the enemy and the Royal Proclamations connected with them. I have carefully considered them, and do not think that they limit or exclude common law rules or principles or, in the case of corporations, restrict the trade which is unlawful to trading with such corporations as are incorporated under the laws of an enemy country. Equally little

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can the Proclamations be read as licences to do anything that they do not in terms prohibit. No suggestion has been made that the position of the respondent company is that of an alien enemy commorant within the realm sub protectione regis, or that the Royal licence has specifically been extended to trading with it.

My Lords, I feel some little difficulty as to the precise form which your Lordships' order ought to take. The action is altogether irregular and should be struck out, all orders made therein being of course discharged. But there is no one before the House who can be made liable for costs or who can be ordered to replace in Court the moneys paid out to the secretary. There can therefore be no order as to costs, and the appellants must be left to pursue any remedy they may have against the secretary personally in respect of the money which was erroneously paid to him.

LORD PARMOOR. My Lords, the respondents were registered at Somerset House on March 29, 1905, as a limited liability company, under the Companies Acts, 1862 to 1900. At the date of the outbreak of the war the company was carrying on business in the United Kingdom under a system of local management. It appears not to be open to question that, before the war, the company was a British company, irrespective of the nationality of the directors and other corporators.

The respondents brought an action against the appellants as acceptors of three bills of exchange for 1100*l.*, 1018*l.* 4*s.* 2*d.*, and 3462*l.* 9*s.* 4*d.*, in payment of goods supplied before the declaration of war. On November 24, 1914, Master Macdonell gave leave to the plaintiff to sign final judgment under Order XIV. This order was affirmed by Scrutton J. and the Court of Appeal.

At the date of the writ all shares in the respondent company, except one, were held by a German company, or by subjects of the German Empire, residing in Germany. One share was registered in the name of the secretary of the company, who resides in London, and in January, 1910, became a naturalized subject of the Crown. All the directors are subjects of the German Empire and reside in Germany. The appellants do not deny that they accepted the three bills of exchange, but raise two points—(i.) that, having regard to

the enemy character of the shareholders and directors of the respondent company, no payment can be enforced by the company during the war of debts owing to the company; and (ii.) that there was no authority in the solicitors for the company to issue the writ in the action. Both matters are of importance, but the main argument both in this House and in the Court of Appeal has been directed to the question how far the enemy nationality of the directors, and of the shareholders of the company for the time being on the register, affects the status of the company after the outbreak of war, and its right to sue in the British Courts.

A company incorporated under the Companies Acts has a continued existence, irrespective of the shareholders for the time being on the register. It is a legal person or entity, which comprises not only these shareholders, but their predecessors and successors. It has a right to sue, and a liability to be sued, in the corporate name. It possesses powers and is subject to obligations distinct from those of the shareholders for the time being on the register, acting either individually or in their collective capacity. I see no reason why the word "nationality" may not be properly applied to a corporate body. The nationality of such a body is wholly distinct from that either of a majority or of the whole number of shareholders for the time being on the register. The contention of the appellants is that when, at the outbreak of war, the shareholders on the register of a British company, carrying on business within the United Kingdom, are wholly or largely alien enemies, the company loses the right, which it would otherwise have, to sue in the British Courts.

My Lords, I do not think that this contention is well founded, and agree in this respect with the opinion expressed by Lord Shaw. The company, after the outbreak of war, does not lose the status of a company registered in this country. If there is an agent duly appointed, who may or may not be a shareholder, the outbreak of war does not per se terminate the agency, and the company is liable to be sued in respect of obligations and is enabled to sue to enforce its rights. In other words, the company still owes obedience to the laws of this country and is entitled to their protection.

It is not necessary to go through the numerous cases quoted to

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your Lordships. I agree with the conclusion in the judgment of the Lord Chief Justice that, subject to the doubtful exception of one case (*City of London* v. *Wood* (1)), there is no English authority which supports the contention of the appellants. On the other hand, there is no direct authority against this contention. Two cases decided in this House support the principle on which the decision of the Court of Appeal is based. In *Salomon* v. *Salomon & Co.* (2) Lord Macnaghten, in specific terms, states his opinion that a company is a different person altogether from the subscribers to the memorandum of the shareholders on the register. In *Janson* v. *Driefontein Consolidated Mines* (3) the question now in debate was indirectly involved, and there are passages in the opinions of the noble and learned Lords which are entitled to be regarded as of high authority. Lord Macnaghten says (4): "If all its members had been subjects of the British Crown, the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien." Lord Davey says (5): "I think it must be taken that the respondent company was technically an alien, and became, on the breaking out of hostilities between this country and the South African Republic, an alien enemy." Lord Brampton says (6): "The company clearly must be treated as a subject of the Republic, notwithstanding the nationality of its shareholders." Lord Robertson says (7): "That this company was a Transvaal subject, and that the nationality of its shareholders is immaterial." Lord Lindley says (8): "For all purposes material for the determination of the present appeal the company must, in my opinion, be regarded as a company resident and carrying on business in the Transvaal although not exclusively there. It was subject to the laws of that country. When war broke out the company became an alien enemy of this country: see the American case of *Society for the Propagation of the Gospel* v. *Wheeler*. (9) If it becomes material to attribute nationality to the company it would, in my opinion, be correct

(1) 12 Mod. 669.
(2) [1897] A. C. 22.
(3) [1902] A. C. 484.
(4) [1902] A. C. 497.
(5) [1902] A. C. 498.
(6) [1902] A. C. 501.
(7) [1902] A. C. 504.
(8) [1902] A. C. 505.
(9) (1814) 2 Gall. 105.

to say that the company was a Transvaal company and a subject of the Transvaal Government, although almost all its shareholders were foreigners resident elsewhere and subjects of other countries. But when considering questions arising with an alien enemy, it is not the nationality of the person, but his place of business during the war that is important." I have troubled your Lordships at some length with quotations from the opinions of noble and learned Lords in the above case in order to avoid the necessity of further reference to other cases. I do not doubt the proposition that a company, registered in this country, would, if proved to be carrying on its business, through its agent or agents, in an enemy country, become enemy in character. I draw no distinction in this respect between a British company and a British-born subject. The enemy character would be the same, though every shareholder and every director was a British-born subject. In the present case there is no evidence that, since the outbreak of the war, the respondents have carried on business in an enemy country. In the absence of such evidence the respondents have the same right of access to the Courts as any other British subject or subject of a friendly State, and if it is relevant to clothe the company with a nationality, this nationality was British.

Lord Wrenbury has expressed the opinion that, though the respondent company has an independent legal existence and is a British legal person, all its directors and all its corporators on the register are German residents in Germany, and that these, apart from technicality, determine the thoughts, wishes, or intentions of the company. "The question for determination is whether when all the natural persons who express and give effect to their wishes through the corporation as a legal abstraction are Germans resident in Germany the corporation can sue in this country because those persons who could not sue are as matter of law absorbed in a separate legal person which is British and which (regarding the corporation as a legal person existing apart from and irrespective of its corporators) can sue." (1) Assuming that it is permissible for some purposes to consider the nationality of the corporators on the register, I find it difficult to accept the conclusion that, after the outbreak of war, the thoughts, wishes, or intentions of the company

(1) [1915] 1 K. B. 916.

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are the thoughts, wishes, or intentions of Germans resident in Germany. The effect of the outbreak of the war is to suspend, as from that date and during the war, all rights of the enemy directors or corporators to take any part in the management and direction or control of a British company carrying on business in this country. This is in no sense a technical question, but one of substance and reality. If any official of the company in this country entered into any intercourse with the enemy directors or corporators, he would be liable to a charge of misdemeanour, and subject, if convicted, to a heavy punishment. It is fair to say that the secretary of the company has denied that he has had any intercourse with the German directors or corporators since the outbreak of the war, or that any payment to the respondent company since that date has been remitted to the enemy. Furthermore, the Board of Trade has taken control of the books of the respondent company in accordance with the powers conferred upon them by statute. Mr. Gore-Browne argued for the appellants that the enemy corporators had disappeared during the period of the war. It is more accurate to say that their rights have been suspended by the outbreak of the war and will remain in suspense during the period of the war. The principle applicable is well stated in *Ex parte Boussmaker*. (1) A bankruptcy claim was admitted on behalf of an alien enemy, the dividend to be reserved during the continuance of the war. The Lord Chancellor, after referring to the general principle that a contract with an alien enemy would be void, says : " But if the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue : but, the contract being originally good, upon the return of peace the right would survive."

Special reference was made in the argument to the case of a corporation sole. Corporations sole are, in the main, ecclesiastical, but by the Public Trustee Act, 1906, the Public Trustee has been constituted a corporation sole, with perpetual succession and an official seal, and may sue or be sued under the above name like any other corporation sole. The object is to give the corporation a continued existence irrespective of the person holding the office of Public Trustee for the time being. If the person holding the office for the time being became an alien enemy, or in any other way became

(1) 13 Ves. 71.

disentitled to sue or be sued in the British Courts, this would not affect the right of the corporation to sue, or its liability to be sued by any persons entitled to receive payment due from funds held by the corporation as trustees. The distinction between the corporators for the time being and the corporation with perpetual succession is not technical, but of essential importance. Similar considerations arise in the case of an ecclesiastical corporation sole. Many of these corporations have existed for centuries with a succession of individual corporators, who are considered in law as one person. A particular bishop or rector might be a person whose rights to sue or be sued had been suspended, but the funds of the corporation are not on that account relieved from liability, and the work of the corporation is not brought to a standstill by a disability to recover debts due in the British Courts.

The principle that the enemy character of shareholders on the register does not take away the right of a British company to sue, or its liability to be sued, is recognized in the Proclamation against trading with the enemy, September 9, 1914, read in connection with the Trading with the Enemy Act, 1914, and the Trading with the Enemy Amendment Act, 1914. The Proclamation, taken by itself, can in no way affect the legal position, but it is different if the terms of the Proclamation subsequently receive statutory confirmation. Paragraph 3 of the Proclamation states: "In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." In s. 1, sub-s. 2, of the Trading with the Enemy Act, 1914, it is enacted that, for the purposes of that Act, a person should be "deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy; provided that any transaction or act permitted by or under any such Proclamation shall not be deemed to be trading with the enemy." This section is not directed to the determination of what constitutes an enemy, but to transactions and acts prohibited either by Proclamation, common law, or statute. The proviso does not, in my opinion, assist the argument of the appellant company and is not relevant

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to the question now in debate. It is indeed essential not to confuse the question of enemy character with the question of trading with the enemy. A British subject is liable to all the penalties which attach to enemy trading, but he does not thereby cease to be a British subject or divest himself of his status as a British citizen. Sect. 14, sub-s. 2, of the Trading with the Enemy Amendment Act, 1914, is directed to a determination of the persons or body of persons to be treated as enemy. "No person or body of persons shall, for the purposes of this Act, be treated as an enemy who would not be so treated for the purpose of any Proclamation issued by His Majesty dealing with trading with the enemy, for the time being in force." This definition is limited to "the purposes of this Act," but the Act is to be construed as one with the principal Act, and the purpose of the Act is stated in the preamble to be to prevent the payment of money to persons or bodies of persons resident or carrying on business in any country with which His Majesty is, for the time being, at war. The effect is that a company registered in this country, and which is not carrying on business in an enemy country, is not an enemy company, and that any person paying debts, due from him to such company, is not trading with the enemy or committing any offence, whatever may be the nationality of its directors and corporators.

At the conclusion of his judgment, Lord Wrenbury quotes the language of *Bank of the United States* v. *Deveaux* (1): The action is "by aliens suing by a corporate name." I think that this dictum is not applicable where the aliens are alien enemies, whose rights of interference or control in the management of the corporation have been wholly suspended; but it is clear that a British company cannot claim to be in a more favourable position than an ordinary British subject, and that the fact of registration in this country would be no answer if it can be proved that its agent is acting under enemy control or holding intercourse with alien enemies.

The second question raised by the appellants is that there was no authority in the solicitor for the company to issue the writ in the action. The question is not whether there was a retainer to the solicitor to issue the writ in the action, but whether, under the conditions consequent on the outbreak of the war, there was any

(1) 9 U. S. (5 Cranch) 91.

representative of the company with authority to give instructions to a solicitor to commence an action on behalf of the company. The cases which decide the practice to be followed when an objection is made to the retainer of a solicitor do not apply. There is no reason why the objection raised in this case on behalf of the appellants could not be entertained at the trial as a defence to the action, and to refuse to entertain it might lead to serious injustice. In the case of *Continental Tyre and Rubber Co.* v. *Thomas Tilling, Ld.*, which was tried before Lush J. in November, 1914, evidence was adduced for the purpose of proving that, prior to the outbreak of the war, the secretary had been given the necessary authority by the company. By arrangement this evidence was admitted as though it had been given on the hearing of the case under debate. The Court of Appeal agreed with Lush J. that, upon the evidence before him, there was sufficient ground for holding that the authority of the secretary had been established. If the secretary had the necessary authority at the outbreak of the war there is no evidence that such authority has been revoked, and there is no revocation by operation of law.

Lush J. finds that the secretary has constantly brought such actions as the present, and that the directors have left it to him to cause a writ to be issued when necessary, and that he has done so in this case with their authority express or implied. Assuming that this finding is justified by the evidence, it does not, in my opinion, support the proposition that at the outbreak of the war the secretary had authority of the company to initiate litigation on its behalf. There is no minute conferring such authority on the secretary, and there is no satisfactory evidence of any resolution giving such authority, although not recorded in a minute. It is advisable that a resolution giving such authority should be formally recorded in a minute, but this would not be conclusive if the fact that such resolution had been passed could be proved from other sources. In my opinion there is no evidence that any such resolution was ever passed, and the finding of Lush J. comes to nothing more than that it was found convenient to allow the secretary to initiate litigation from time to time, whether his authority is to be regarded as conferred in each case or as ratified by subsequent acquiescence.

Mr. Upjohn argued that if the secretary had not authority he

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could obtain it by taking the necessary steps and that the objection was of a technical character. It is a sufficient answer to this argument to say that, whatever steps may be necessary to confer authority on the secretary, no such steps have, in fact, been taken. As at present advised, I think that there is no way in which the necessary authority could be conferred upon the secretary. The difficulty is certainly not met by the provision in the articles of association which purports to provide that a quorum of one is sufficient to constitute an adjourned meeting. My Lords, in the main contention the respondents have succeeded, but the appeal succeeds upon the second point.

I agree in the form of the order proposed by Lord Parker.

Order of the Court of Appeal reversed and action dismissed, and all orders made therein discharged.

Lords' Journals, June 30, 1916.

Solicitors for appellants: *Andrew, Wood, Purves & Sutton, for R. A. Rotherham, Coventry.*

Solicitors for respondents: *Stephenson, Harwood & Co.*

[HOUSE OF LORDS.]

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July 21.

ATTORNEY-GENERAL (ON THE RELATION OF PICKFORDS, LIMITED) . . . . . APPELLANT;

AND

GREAT NORTHERN RAILWAY COMPANY . RESPONDENTS.

Highway—Bridge over Railway -Increase of Traffic—Standard of Maintenance—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 46.

Where a public highway is carried over a railway by means of a bridge constructed under the provisions of s. 46 of the Railways Clauses Consolidation Act, 1845, the railway company is liable to maintain the bridge in the condition as to strength in relation to traffic in which it was at the date of completion, but is not liable to improve and strengthen the bridge to make it sufficient to bear

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* *Present:* LORD BUCKMASTER L.C., EARL LOREBURN, VISCOUNT HALDANE, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

the ordinary traffic of the district which may reasonably be expected to pass over it according to the standard of the present day.

So *held* by Lord Buckmaster L.C., Earl Loreburn, Lord Shaw of Dunfermline, and Lord Sumner ; Viscount Haldane dissenting.

The principle of *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* [1915] A. C. 654 applied.

Decision of the Court of Appeal [1915] W. N. 263 affirmed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Warrington J.

The appeal had reference to the maintenance and repair of a bridge by means of which the highway leading from Hornsey Road to Crouch End was carried over the Great Northern Railway, and it raised the question whether the respondents, the Great Northern Railway Company, were liable merely to maintain the bridge in the same condition as to strength in relation to traffic as it was in when completed, or whether they were liable to improve or strengthen the bridge so as to render it sufficient to bear the ordinary traffic which might reasonably be expected to pass over the bridge according to the standard of the present day.

The bridge was constructed between 1862 and 1867 by the Edgware, Highgate, and London Railway Company under the powers of a special Act (25 Vict. c. xlvi.) which incorporated the Railways Clauses Consolidation Act, 1845, and by the Great Northern Railway Act, 1867, the undertaking of the above-mentioned company was transferred to and vested in the respondents. It was admitted that the bridge as originally constructed complied with the statutory requirements in relation thereto. In 1867 the railway was inspected by Colonel Hutchinson, the officer in that behalf appointed by the Board of Trade, who reported that all the bridges were substantially built and of sufficient strength, and it was shortly afterwards opened for public traffic. The bridge in question was constructed by means of cast-iron girders which were designed to carry a road thickness of one foot. At later dates this road thickness had been considerably increased, and the weight upon the girders had been increased by the provision of larger water mains, a thick bed of concrete, and heavy cast-iron plates.

In December, 1912, Pickfords, Limited (who were desirous of using the bridge for heavy motor traffic), having obtained the

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fiat of the Attorney-General, instituted these proceedings, asking for a mandatory injunction to compel the respondents to put the bridge into a proper state of repair and into a condition of safety for the passage of the traffic upon or to be expected upon the highway carried by the bridge.

At the trial before Warrington J. the respondents admitted that, in view of the fact that alterations had been made to the bridge since its original construction, it was no longer of the standard of strength possessed by the original statutory work and were willing to restore the bridge to its original standard of strength.

The measure of the respondents' liability turned upon the construction of s. 46 of the Railways Clauses Consolidation Act, 1845. That section provided as follows: "If the line of railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company: Provided always, that, with the consent of two or more justices in petty sessions, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level."

Warrington J. held, first, applying the principle of the decision of the Court of Appeal in *Attorney-General* v. *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* (1), that the respondents were bound to maintain the bridge in question in such a condition of safety that it would be sufficient for the passage of the traffic which might be expected to use the highway of which it formed part, there being nothing in the statute from which they derived their authority exempting them from this obligation; and secondly, that the respondents, who had affixed notices to the bridge stating that it was insufficient to carry motor traffic beyond a certain weight and prohibiting the passage of such traffic over the bridge, could not relieve themselves of the obligation to provide for heavy motor

(1) [1914] 3 K. B. 1.

traffic by availing themselves of the Locomotives Acts and the Motor Car Acts, and he made a declaration accordingly.

Before this case was taken up to the Court of Appeal the House of Lords had delivered judgment in the *Sharpness Case* (1) reversing the decision of the Court of Appeal.

The Court of Appeal (Swinfen Eady L.J., Phillimore L.J., and Bankes L.J.) reversed the judgment of Warrington J. upon the first point, mainly upon the authority of the decision of the House of Lords in the *Sharpness Case* (1), being of opinion that the liability of the railway company was limited to maintaining the bridge in the condition as to strength in relation to traffic in which it was at the time of completion; and as a consequence it became unnecessary to consider the second point.

The appeal to this House was originally argued on May 9, 11, and 12, 1916, before Viscount Haldane, Lord Sumner, Lord Parmoor, and Lord Wrenbury, but was subsequently set down for re-argument.

1916. June 5, 6. *Sir Robert Finlay, K.C.*, and *W. A. Jowitt* (with them *Ernest Charles, K.C.*), for the appellant. Upon the true construction of s. 46 of the Railways Clauses Consolidation Act, 1845, the road over the bridge is to be kept up to the same level as the adjoining segments of the road. The road which is to be carried over the railway means the road with all its incidents. Sect. 50 deals with height and width and gradients, but does not deal with the strength of the bridge, and the obvious implication is that the strength is to be commensurate with the road which is to be carried over the railway. The strength is not defined because this road is part of the highway, and it is recognized that the strength may vary from time to time. The meaning of the section is that the public are to have the same rights in respect of the highway where it passes over a bridge as they had before, and that the severance of the road is not to diminish their rights. Sect. 51 has no direct bearing on the question, but it affords a valuable indication that the bridge is to be kept up to the standard of the road. Sect. 66 has no application, but deals only with the case of compliance with the Act being impossible or extremely inconvenient without any corresponding

(1) [1915] A. C. 654.

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advantage to the public. Sects. 4 and 6 of the Railway Regulation Act, 1842, are intended merely to secure that the line shall not be opened if the opening would be attended with danger to the public, and do not affect the present question. The difficulty has been caused by treating this bridge as a separate structure and not as a road carrier, but the road is part of the bridge: *Bury Corporation* v. *Lancashire and Yorkshire Ry. Co.* (1) The railway company, who have stepped into the shoes of the highway authority in respect of this part of the road, must be regulated by the same standard. As regards the duty of the highway authority in respect of the maintenance of the roads under their control, it is well settled that the road authority is bound to keep its roads up to date, that is, in a fit condition to bear the traffic (including traction traffic) which may reasonably be expected to come upon them: *Chichester Corporation* v. *Foster* (2); *Attorney-General* v. *Scott* (3); *Wallington* v. *Hoskins* (4); *Reg.* v. *Inhabitants of High Halden* (5); *Reg.* v. *Inhabitants of Henley* (6); *Hemsworth Rural Council* v. *Micklethwaite.* (7) [They also referred to *Barnsley British Co-operative Society* v. *Worsborough Urban Council.* (8)]

Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. *Attorney-General* (9) proceeded upon the very special words of the particular Act. There is nothing in s. 46 even remotely corresponding to the provisions which were the subject of consideration in that case, and in the absence of special provisions in the statute the presumption is strong that the road which is carried over the bridge is to be subject to the same standard as the road on either side of it, i.e., a standard corresponding to the obligation of the road authority: *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (10); *Reg.* v. *Inhabitants of Ely* (11); *Rex* v. *Kerrison.* (12) There is nothing in s. 46 which takes away the rights of the public, and the section cannot be treated as an exhaustive code.

(1) (1888) 20 Q. B. D. 485; (1889) 14 App. Cas. 417.
(2) [1906] 1 K. B. 167, 173, 175–6.
(3) [1905] 2 K. B. 160, 166.
(4) (1880) 6 Q. B. D. 206, 215.
(5) (1859) 1 F. & F. 678.
(6) (1847) 10 L. T. (O.S.) 110.
(7) (1904) 2 L. G. R. 1084, 1090, 1091.
(8) [1916] 1 A. C. 291.
(9) [1915] A. C. 654.
(10) [1909] 2 K. B. 403, 412.
(11) (1850) 15 Q. B. 827, 840–3.
(12) (1815) 3 M. & S. 526, 531.

[LORD BUCKMASTER L.C. intimated that their Lordships would hear counsel for the respondents on the first point before discussing the question of the effect of the notices as to heavy motor traffic.]

Tomlin, K.C., and *W. Vernon* (*Sir John Simon, K.C.*, and *A. Andrewes Uthwatt* with them), for the respondents. The obligation of the respondents is to maintain a statutory structure. Sect. 46 imposes an obligation to construct a particular thing at a particular time and an obligation at all times thereafter to maintain and repair that particular thing. The appellants contend that the obligation is, if necessary, to construct a new bridge according to the requirements of the traffic passing over it from time to time, and it is assumed that the road authority and the bridge authority are the same; but they are different bodies with different duties, and in any event the only liability which can be put upon the railway company is the liability of the bridge authority. The appellants' argument is based on this being a road-carrying bridge, but "road" in the section means the physical road, the road across which the railway is going to be run, and the statute specifies the kind of bridge which must carry the road. "Maintain" does not mean strengthen, improve, or reconstruct—it means that the railway company must keep up the thing which is put there. It is said that the statute says nothing about the strength of the bridge, but the condition as to strength is really imposed on the railway company by the requirements of the Board of Trade, and there is no room for any common law doctrine to supplement the provisions of the Legislature.

Sir Robert Finlay, K.C., replied.

LORD BUCKMASTER L.C. stated that their Lordships would give notice to counsel if they desired to hear any argument on the second point.

July 21. LORD BUCKMASTER L.C. (1) My Lords, the question raised in this case is of unusual importance. On the one side it involves an undoubted limitation of the rights of user of public roads carried by a bridge over the lines of a railway company, and on the other it may throw upon railway companies the obligation

(1) Read by Earl Loreburn.

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of reconstructing such bridges from time to time to meet the growing demands of heavy modern traffic.

The circumstances under which this case has arisen must exist in many instances, and they are likely to increase. The respondent company, by their statute passed in 1867, acquired the undertaking of another railway company known as the Edgware, Highgate, and London Railway Company, and thereby became subject to all the obligations imposed by the special Acts and the public statutes which had formerly been borne by the original undertakers. The Edgware Company had been incorporated by a private Act passed in 1862, by s. 1 of which it was provided that the Railways Clauses Consolidation Act of 1845 should be incorporated with and form part of the special Act, while by s. 19 the company was authorized to make and maintain the railway in accordance with the deposited plans and sections.

The plans which were deposited showed a bridge, which is the bridge in question in these proceedings, by means of which a public highway known as Crouch End Hill, in the county of Middlesex, was to be carried over the railway. The railway was completed before its acquisition by the respondent company, and the bridge was built for the purpose of carrying the road. There is no dispute that at this time, and for many years afterwards, the bridge was in all respects adequate for the purpose of carrying the proper and ordinary traffic that passed over the road. At some later date, however, though the date is nowhere expressly specified, two water pipes of twelve inches diameter, which were carried across the bridge when it was constructed, were removed, a water pipe of twenty inches diameter substituted, and three additional water pipes, two of fifteen inches and one of twelve inches, were added.

The railway company admitted liability to strengthen the structure of the bridge, so as to provide the same margin of strength over that required to bear the new water pipes as the margin that existed formerly over that needed for the old, and it would not have been necessary to refer to this matter at all were it not for the fact that the proceedings out of which this appeal has arisen appear, in the first instance, to have been based upon the allegation that the bridge had been so weakened by the added strain of the heavier pipes as to deprive the road of the support which it formerly

enjoyed. Even, however, if this were the original ground of complaint, the true dispute that has arisen, and upon which decision is required, is entirely independent of the question of these pipes, and arises in this way.

The appellants have placed upon the road heavy motor engines which the bridge is unfitted to bear. They allege, and for the purpose of this case it may be assumed, that the passage of such vehicles would not be regarded as extraordinary traffic upon other portions of the road, and they say that the obligation cast upon the railway company is from time to time to strengthen and, if necessary, to rebuild the bridge so as to carry all the traffic, whatever it may be, which can lawfully pass over the rest of the road. This is the real question involved in the appeal.

Now there was no specification as to the strength and character of the bridge contained in the special Act under which the railway was constructed. The obligation under which the railway company rests is that imposed by s. 46 of the Railways Clauses Consolidation Act of 1845, which, as I have stated, was incorporated in the special Act authorizing the construction of the railway. [His Lordship read the section.]

The statute contains no definition whatever, nor indeed would it be required, of the height of a bridge that carries the road. It is only the height of a bridge that crosses a road to which reference is made in the subsequent section of the Act. So far as a bridge carrying a road is concerned, the only material provisions are those contained in ss. 50 and 51, and these specify only the width, the fences, and the ascent to the bridge.

It is urged by the appellants that these provisions create no standard of strength, and that this can only be formed by making the bridge satisfy the essential condition that it must carry the road and the traffic that the road from time to time must bear.

I find myself unable to accede to this contention and indeed I think that the provisions that secure the adequacy of the bridge are more effective than the appellants suggest.

By s. 4 of the Railway Regulation Act, 1842, it is provided that no railway shall be opened until after notice to the Lords of the Committee of Her Majesty's Privy Council appointed for Trade and Foreign Plantations, now the Board of Trade, and by

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s. 6, if on inspection there is reason to think that by any incompleteness of the works the opening of the railway would be attended with danger, the opening of the railway may be postponed until it appears that such opening can safely take place. The works undoubtedly include the bridges which carry the roads, and regulations made under this statute require the deposit of the plans showing the structure of those bridges in order that their strength may be ascertained. These considerations only show the means by which the adequacy of the bridge is first established. They do not touch the question as to whether the liability under s. 46 is to maintain the bridge which has been so passed, or to maintain any bridge that may hereafter be required. This question, which is one of undoubted difficulty, would have been attended with far greater uncertainty had it not been for the decision of this House in the case of *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General.* (1) In that case a canal company were proposing to take their canal through a highway, and the Act which authorized the construction of the works provided that this highway should be carried by a bridge of such dimensions and in such manner as the commissioners should approve, and obligations were cast upon the canal company to maintain such bridge. The case decided two important and relevant matters. First, that where a private Act casts upon a corporation the burden of maintaining a particular bridge carrying a highway across their works, the question of what would be the common law liability of the person who had intercepted a highway under similar circumstances was irrelevant for the purpose of construing the statute. If the statute imposed the duty of maintaining a defined structure, that liability was the true limit of the obligations of the company. Secondly, that an obligation expressed in general terms " from time to time to maintain and support " such a bridge was only consistent with maintaining the structure that had once been erected. If, therefore, s. 46 in this case imposes upon the railway company the obligation only of repairing a particular bridge, namely, the bridge which was properly erected to carry the road when the railway was made, then all outside considerations as to what the obligations might have been apart from the statute become irrelevant, and no

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greater duty than that of maintaining such a bridge is cast on them by the statute. In my opinion this is all that the statute does. The road is to be carried by the bridge, and it is such a bridge, with the immediate approaches and all other necessary works, which has to be executed and thereafter maintained at the company's expense.

I cannot think that these words mean that the bridge is to be a changing and varying structure, altered from time to time to meet the growth of traffic wholly unforeseen and unexpected when the railway was made. There are no words in the section that imply that the structure, when once properly made to bear the road, has ever to be rebuilt in a new and strengthened form; and the only way in which the appellants urge that this meaning can be introduced into the language of the Act is by saying that the road itself is a varying and inconstant quantity, and that the bridge must carry the road whatever the road may be. This, I think, puts upon the word "road" a meaning that, in this connection, it is not authorized to bear. The bridge is only bound to carry the road through which it passes, and that is the road determined at the moment when the railway is built, for it does not follow at all that the road within the meaning of the section is the same thing as the use of the road, which may change from time to time. I think, further, confirmation of this view is to be found in the section which relates to the widening of a bridge in case the original construction is of inadequate width.

It is a remarkable thing that the Act expressly provides the way in which the road is to be altered so as to be made wider if the increased demands of traffic require it, while no corresponding provision whatever is to be found as to its being made stronger in case the traffic becomes more burdensome. In this view of the case it is not necessary to consider whether Swinfen Eady L.J. was correct in thinking that under s. 66 there was power to refer any doubt as to the strength of the original structure to the Board of Trade. It is urged by the appellants that such reference could only be made where there was an attempted deviation from compliance with the terms of the statute, and the learned Lord Justice undoubtedly assumes that the power extends to all questions arising on construction, whether the provisions of the Act are departed from or

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no. I am far from saying that his view in this matter is incorrect, but this it is unnecessary to decide. It is, however, useful to notice that when the certificate is given, the certificate, if it related to a bridge, would be a certificate that the bridge was constructed in conformity with the provisions of the Act. It is the bridge constructed in conformity with the provisions of the Act which the railway company are bound to maintain, and they are, in my opinion, subject to no further liability. I have avoided expressing any opinion upon the question as to how far traffic of an unusually heavy character placed for the first time upon a road constitutes a lawful user of the highway. Traffic may well be of such a nature that its presence would constitute a nuisance, and the use of the highway thereby would be unlawful. But, apart from this, there may be unusually heavy traffic which, originally extraordinary traffic, upon a particular road becomes ordinary owing to the changed circumstances of the district through which the road runs; and I have throughout assumed that it is this latter form of traffic which the appellants desire to place on the road, and which the bridge is unfit to bear.

In my opinion the judgment of the Court of Appeal was right and this appeal should be dismissed with costs.

EARL LOREBURN. My Lords, the point in this appeal is quite short and has already been stated. In my opinion the Court of Appeal were right. What the railway company was required long ago to build consisted of a specific structure to be built so as to comply with given conditions. It was built in compliance with those conditions to the satisfaction of those concerned, so far as we know, and has stood ever since. That was the thing which the railway company had to maintain with the road on the top of it.

If the language of the Act imposed upon this company either the duty of originally building a bridge of size, strength, and quality sufficient to meet all possible requirements of the future, or the duty of from time to time reconstructing the bridge so as to keep pace with successive advances in the carriage of heavy traffic along roads, then of course it would be binding upon me. I find no such language, but merely a direction to build a bridge and maintain it together with the road upon it. Whether or not the strength or

the details are specified in the Act seems to me of no importance, provided that the thing built complies with what the Act requires. If the Act merely directed a bridge to be built, then it would be a bridge reasonably suitable according to the standard of the time for the purpose designated. The railway company is not called upon to do more. I agree with Lord Sumner's opinion as to what the Act does require. If traffic heavier than the prescribed bridge will bear is placed upon the road the fault is not with the bridge or those who have to maintain it and the road over it, but with the people to whom Parliament has secured a way with a certain measure of strength and who think fit to place upon it weights in excess of that measure.

The case of *Sharpness New Docks, &c., Co.* v. *Attorney-General* (1), as I understand the decision, is in accordance with this view. I thoroughly agree with that decision. Even if I did not agree with it I should be obliged to follow it. But if some of the language used in the debate on that case bears the construction sought to be placed upon it in the argument at the Bar, then I should respectfully differ and should say that it was not necessary for the decision. To my mind there is not any legal presumption in regard to the construction of an Act of Parliament such as was pressed upon us. There have been, it is true, expressions of opinion by high authorities. But the Act speaks for itself, and the law does not, I think, attach to its construction any rule beyond the ordinary canons of construction. I do not follow the view that any special presumption can be invoked for the purpose of interpreting an Act which authorizes the interruption of a highway. When the Act imposes a duty of repairing the newly-made road you would naturally, though not necessarily, expect the new authority to be invested with the same obligations as its predecessor, but the burden may be made heavier or lighter. I see no presumption of law either way. In the present case, and I think in most if not all cases, the Act itself says what is to be done. Here it says, to be sure, that the road is to be maintained—the road across the bridge. I cannot read that as meaning that the railway company may be called on to pull down the bridge or alter its character in order to suit the road's new burdens, if there are such burdens.

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For these reasons I am of opinion that this appeal fails.

I express no opinion in regard to the duty of road authorities to make provision for special kinds or degrees of traffic. The question does not arise here, because the duty of the railway company as to the support of the road by the bridge depends on statute. It is a difficult question and will require full argument.

VISCOUNT HALDANE. (1) My Lords, I regret that I am unable to concur in the conclusion to which I gather that the majority of your Lordships have come in this case. The question is whether the Court of Appeal were right in holding that the obligation of the respondents was limited to the maintenance of the bridge which carries the public highway from Hornsey Road to Crouch End over their railway merely in the same condition as to strength in relation to traffic as it was at the date of its completion some forty-eight years ago, and that the obligation did not extend to maintaining the bridge, by improving and strengthening it where necessary for the purpose, in such a fashion as to enable it to bear the ordinary traffic of the district coming along that public highway, and which might reasonably be expected to pass over it according to the standard of the present day. The highway with which the controversy is concerned was severed by the Edgware, Highgate, and London Railway Company, in the exercise of statutory powers conferred on it by a special Act of 1862, which incorporated the Railways Clauses Consolidation Act of 1845. Pursuant to obligations imposed by s. 46 and other sections of the latter and general Act, the bridge in question was constructed. Under a later statute the respondents have succeeded to the obligations of the original company.

Questions resembling, in point of principle, that before us have come before the Courts in a series of cases, of which the following are examples: *Rex* v. *Inhabitants of Kent* (2), *Rex* v. *Inhabitants of Parts of Lindsey* (3), *Rex* v. *Kerrison* (4), *Reg.* v. *Inhabitants of Ely* (5), *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (6), and *Macclesfield Corporation* v. *Great Central Ry. Co.* (7) I think that

(1) Read by Lord Sumner.
(2) (1811) 13 East, 220.
(3) (1811) 14 East, 317.
(4) 3 M. & S. 526.
(5) 15 Q. B. 827.
(6) [1909] 2 K. B. 403.
(7) [1911] 2 K. B. 528.

a principle has been developed by the decisions of the Courts in these cases, and that it is one which commends itself on general grounds as well as by reason of the weight of a series of authorities. The principle is that where persons acting under statutory powers conferred on them for their own convenience interrupt a highway, they will, unless the statute provides otherwise, be presumed to be under an obligation to construct such works as will restore to the public the use of the highway and to maintain the works at their own expense in a condition adequate to the public need. When, under such circumstances, the public road which has been interrupted is restored by being carried on a bridge, the bridge, and the road which thus forms part of it, must be kept up to such a standard as will admit of the public enjoying the facilities for ordinary traffic over the road that they would have had if the interruption had not taken place and if the substituted works had not been executed. This principle can, of course, be excluded if the Legislature thinks fit to do so in unambiguous words. As Lord Dunedin observed in the recent case of *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* (1), if the statute which authorizes the works goes on to define what are to be the rights and obligations following from the execution of the statutory act, it is in the language of the Legislature, and there alone, that rights and remedies are to be looked for.

My Lords, it is said that in the present appeal we are bound by the decision in the *Sharpness Case.* (1) I took a leading part in advising the House as to the decision which was then given, and I am not likely to be wanting in loyalty to the view taken by this House on that occasion. But what was that view? Certainly not that we were laying down any novel principle, or making a precedent which would be decisive in the construction of a statute differing substantially from that which we were then construing. All the House did was to interpret the particular language of a private Act in order to ascertain whether the Act itself contained such an exhaustive definition of rights and duties as would, in accordance with Lord Dunedin's canon, exclude the general principle to which I referred at the outset as imposing an obligation if the statute did not exclude it. With all deference to those who think otherwise,

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I am quite unable to read the judgment of this House in the *Sharpness Case* (1) as having done more than interpret a particular set of words. And in interpreting other words in another statute such a judgment can render no more assistance than that which is derived by a Court which has to construe a will of personal estate from decisions on other and differently worded wills. In the *Sharpness Case* (1) the private Act appointed commissioners who were to determine what should be done, and provided that the company were not to "make the said canal . . . . across any common highway . . . . until they shall . . . . have made and perfected such bridges . . . . across such highway . . . . and of such dimensions, and in such manner, as the said commissioners shall adjudge proper; and all such . . . . bridges . . . . to be made shall, from time to time, be supported, maintained, and kept in sufficient repair, by the said company." These words were interpreted as giving the commissioners a complete discretion as to strength, materials, and any other particulars, and as enabling them to look ahead and take account of future developments of traffic. The bridges which were to be made and from time to time maintained and supported as the commissioners should determine were constructed in a fashion approved by them in 1812, and, as so constructed, were maintained at the standard which the commissioners had in 1812 determined as that which was to regulate their construction once for all. The House of Lords held that the words used prescribed unambiguously the extent of an obligation which, by its terms, excluded a standard higher than that which the commissioners had prescribed. It was for the latter to consider and finally prescribe the standard. When they had certified what was to be made and perfected, with a view to the future, it might be, as well as to the past, they had defined the extent of the duty of the company and became functi officio.

My Lords, the words of s. 46 of the Railways Clauses Act are very different. To begin with, there are no commissioners introduced whose decision is to prescribe the obligation. The road is simply directed in general terms by the statute to be carried over the railway by means of a bridge. The only standards prescribed as standards by which the obligation to construct the bridge is in terms

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regulated are standards relating exclusively to height and width and to ascent and descent. As to strength and material, which were equally within the unlimited power of prescription of the statutory commissioners in the *Sharpness Case* (1), not one word is said in s. 46. If the obligations of the railway company as to these were intended to be excluded from the operation of the general principle which the decided cases have, as I believe, established, one would expect to find an intention to that effect expressed in the section, more particularly as it has provided for the particular cases of height and width. But all that is said in s. 46 is that "such bridge"—that is the bridge by which the road is directed in general terms to be carried over the railway—"with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter *maintained* at the expense of the company." If this be really all that is said in the statute it would seem to me plain that the duty to maintain the road which the bridge includes extends to the necessities of the ordinary traffic which the public are from time to time entitled to bring along the road. This conclusion is, in my opinion, the only one which is consistent with the general principle established by the authorities to which I have previously referred, and also with another principle which was not seriously questioned in the argument for the respondents, that the body which is charged with the duty of maintaining a highway has to maintain it in a condition which will enable it to carry the ordinary traffic on that highway in whatever form that ordinary traffic may develop.

If this be so, the duty of the respondents is to do what is necessary to strengthen the bridge, so that it may be adequate to the requirements of the ordinary traffic of to-day on the road. It is suggested that other sections in the Railway Regulation Act of 1842 and in the Railways Clauses Act show that there is no such duty on the company. My Lords, I have examined the sections referred to and I do not think they bear out this contention. Turning first to s. 6 of the Railway Regulation Act, 1842, this section only enables a Government department to postpone the opening of the railway in case the Government inspector shall report that such opening would be attended with danger to the public "by reason

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of the incompleteness of the works." Surely that must mean incompleteness at the time of their original construction. Sect. 49 of the Railways Clauses Act relates only to the case of bridges which carry the railway *over* roads, and makes provision in that event for the regulation of the width and height of arches. Sect. 50 deals with bridges to be erected for carrying roads over railways, but it prescribes nothing, excepting as to fences and to width and ascent, to which s. 46 had already referred. Sect. 51 enacts that where the width of the road is itself less than the width prescribed for the bridge by s. 50 the width of the latter may be diminished correspondingly, but must be increased correspondingly up to the prescribed maximum if the width of the road is thereafter increased. Sect. 65 enables the justices, on the application of the surveyor of roads, or of any two householders of the parish or district, to compel the company to maintain or keep in repair any bridge which is found to be out of repair. Sect. 66 provides that in case any difference shall arise between the company and any authority empowered to enforce the construction of the roads, bridges, or works as to the construction, alteration, or restoration of the same, the Board of Trade may decide on the proper manner of such construction, alteration, or restoration, and authorize any arrangement or mode of construction which shall appear to them to be in substantial compliance with the provisions of the Railways Clauses Act or the special Act, provided that they are satisfied that existing private rights or interests will not be injuriously affected thereby.

My Lords, I am unable to see that any of the sections to which I have just referred affect the construction of s. 46 on the only point which is material in this appeal. As to s. 46 itself, I think that, for the reasons I have stated, it is an enactment of radically different structure from that which was interpreted by this House in the *Sharpness Case*. (1) It appears to me that, unlike the latter enactment, its language does not exclude the operation of the general principle to which I have adverted, and that accordingly the judgment of the Court of Appeal was wrong.

LORD SHAW OF DUNFERMLINE. (2) My Lords, I concur. In my opinion the obligations of the respondents are to be measured by

(1) [1915] A. C. 654. (2) Read by Lord Sumner.

the language of the statutes under which the railway was constructed and the bridges made.

By the Edgware, Highgate, and London Railway Act, 1862, it was provided that the Railways Clauses Consolidation Act, 1845, should be incorporated with and form part thereof. The bridge which is in question in this case was constructed between the years 1862 and 1867 in accordance with the various railway statutes and the requirements thereunder of the Board of Trade. So far as the Consolidation Act of 1845 is concerned the obligation was in the terms already quoted—the road was to be "carried over" the railway "by means of a bridge of the height and width and with the ascent or descent by this or the special Act in that behalf provided," and such bridge and the works connected therewith "shall be executed and at all times thereafter maintained at the expense of the company."

There are two views of this section, and at the present very critical development of road traffic in England the question at issue between the parties is of great importance. Road traffic has so developed, and, in particular in certain districts, local requirements have so changed in recent years, that great alterations have been necessitated in order to give the accommodation and the strength which these developments require. In the present case it is conceded that heavy road motor traffic is legitimately placed upon the roads, but would subject the existing bridge to a strain which it is unable from its structure to bear. It is accordingly demanded that the road, thus necessarily altered, strengthened, and, it may be, enlarged throughout the district, should be linked up by the bridge so as to be "carried" to the full effect of enabling the purpose of through-going traffic to be achieved. The other view is that such alterations, strengthenings, and enlargement, however expedient, do not fall within the scope of the obligation of maintenance, which, and which alone, falls upon the railway company.

The Court of Appeal has decided that the respondents "are liable to maintain the bridge in question in the same condition as to strength in relation to traffic as it was at the date of its completion, but that the defendants are not under any liability to improve and strengthen the bridge to make it sufficient to bear the ordinary traffic of the district which may be reasonably expected to pass over it according to the standard of the present day."

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This is a strong, clear, and wide pronouncement, and it was argued, my Lords, that the result of it will be to render the heaviest through-going traffic impossible, and that in that way the network of road accommodation throughout the country must be broken by the bridge described, and by all others in similar case.

In *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (1) Lord Moulton, then L.J., said: "In my opinion, the law as settled by the cases of *Rex* v. *Inhabitants of Kent* (2), *Rex* v. *Inhabitants of Parts of Lindsey* (3), *Rex* v. *Kerrison* (4), and *Reg.* v. *Inhabitants of Ely* (5), practically amounts to this: that, where persons, acting under statutory authority, for their own purposes interrupt a highway by some work which renders it impossible for the public to use it, an obligation is prima facie imposed upon them to construct such works as may be necessary to restore to the public the use of the highway so interrupted, and that the obligation so imposed is of a continuing nature, involving not only the construction of such works, but also their maintenance."

Were this important matter, my Lords, left to be settled upon a general principle, it appears to me to be not improbable that the one thus enunciated by Lord Moulton might be found a safe guide in the solution of the pracactil difficulty which has emerged. But, in view of the judgment of this House in the *Sharpness Case* (6), I do not feel myself able to hold that the proposition so expressed can now be maintained to be law. As was said in that case by the noble and learned Viscount who has preceded me, where statutory provisions are made, it is they which form the rule of liability if the statute "contains a set of provisions which appear on their face to be intended as exhaustive. . . . ." Referring to s. 61 of the Act then under consideration, he observed that it "does not appear to me to admit of resort to any presumption of intention based on the analogy of the common law." In the judgment of Lord Dunedin the cases founded on by Lord Moulton are examined, and there my noble friend said that he was unable to agree with the dictum, "which in my opinion is too broadly expressed, as it would import a common law obligation running side by side with the expressed statutory

(1) [1909] 2 K. B. 403, 412.
(2) 13 East, 220.
(3) 14 East, 317.
(4) 3 M. & S. 526.
(5) 15 Q. B. 827.
(6) [1915] A.C. 654.

obligations." Lord Parker of Waddington said: "It is one thing to rely on a common law principle where a statute is silent. It is quite another thing to invoke a common law principle in order to impose an obligation different from or in addition to the obligations which are defined by the statute." This is also the view of Lord Parmoor.

It is thus vital to see what was the extent of the statutory obligation in the present case. The appellants argued that the railway company's obligation was that "such road shall be carried over the railway," and that this involved that, as the road traffic developed and the road required additional dimensions and strength, so with the bridge, which otherwise would not be carrying the road. The consequence of such an argument might result in much public convenience: but, of course, it would involve an enormous addition to railway obligations. The reply to this argument, which was insisted on with much ability by Mr. Vernon, was that the statutory obligation was not left in the general terms of merely carrying over such road, but that the exact means were prescribed by which this obligation was to be performed, namely, "by means of a bridge of the height and width and with the ascent or descent provided" by statute, and that it was such bridge and no other which was to be executed and maintained for the future.

It is accordingly necessary to consider very carefully what was required by the various statutory enactments with which the railway company constructing the line had to comply. Under the Railway Regulation Act, 1842, certain documents had to be deposited with the Board of Trade before the railway was opened, and it is admitted that the respondents' statement is correct that "among the documents so required to be deposited were drawings in detail of all bridges or viaducts either over or under the railway, accompanied by sufficient information to enable the strength of each bridge to be ascertained by calculation." These requirements were complied with; and in terms of the statute the detailed drawings were deposited with the Board of Trade. Nor is it denied that from these and from the dimensions contained therein the carrying power of the bridge could be estimated. The railway was inspected, was approved by the Board of Trade's officer, and was opened, the bridge in question being also approved.

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So far accordingly as the working out of the Act is concerned the resultant situation was the same, in my humble opinion, as if this particular bridge, with its specific dimensions and its consequential strength, had been the subject of express statutory stipulation for erection and maintenance.

In regard to maintenance, it should be further observed that there is nowhere in the statute any obligation, so far as can be discovered, with regard to the increase of the strength of the bridge according to future traffic requirements. My Lords, I feel bound to assume that when the Board of Trade inspection took place the officials of the department would to some extent see that a margin was allowed for the reasonable anticipations of development of the road traffic—that, in short, the proximate future would be provided for; and I respectfully agree with the judgment of Lord Parmoor in the *Sharpness Case* (1) on this point.

In the Consolidation Act of 1845 there is, however, one section in which a reference is in fact made to operations upon bridges "after the construction of the railway." I refer to s. 51. It provides that "if at any time after the construction of the railway the average available width of any such road shall be increased beyond the width of such bridge on either side thereof, the company shall be bound, at their own expense, to increase the width of the said bridge to such extent as they may be required." This, it will be observed, is as to width only. But, even there, a limit is put to the obligations of the railway company by these words, "not exceeding the width of such road as so widened, or the maximum width herein or in the special Act prescribed." This in one view is indicative of the desire of Parliament to make it quite clear that even with regard to the future on the point of width the limits of railway obligation should be clearly defined. To take the instance which I put in the course of the argument: if a narrow carriage road (with a railway bridge over it) was increased to forty feet in width, it seems reasonably clear from the other clauses of the Act of Parliament that the maximum width to which the railway company would be obliged to go in accommodating the bridge to the road would be a width of only twenty-five feet. The idea, in short, of the exact equation of accommodation between road and bridge, or of any

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obligation of the railway company upon such a footing, is thus negatived. And, with regard to the strength of the bridge, there is no provision whatsoever, limited or unlimited, for future increase or alteration thereof. I cannot, in these circumstances, hold that such a provision should be read into the statute, which, as already explained, I hold to be the measure of the respondents' obligations.

I am accordingly of opinion that the judgment of the learned Lords Justices of the Court of Appeal is correct. I may add, however, that the fact that the judgment of this House is to that effect makes the situation with regard to the accommodation of the road traffic of the country, and the possible serious interruption thereof, one for the attention of the Legislature. The adjustment of the responsibilities of all parties in regard to those alterations and developments which the needs of the country demand is a legislative task, but does not fall within the sphere of judicial remedy.

LORD SUMNER. My Lords, the construction of 8 & 9 Vict. c. 20, s. 46, is the real question in this appeal. Though the case has been twice elaborately argued, I think the meaning of the section remains tolerably clear.

As applied to this railway the section required that in 1867 the undertakers should carry the public highway in question, known as Crouch End Hill, over their railway "by means of a bridge of the height and width and with the ascent or descent by this or the special Act in that behalf provided," and that "such bridge, with the immediate approaches and all other necessary works connected therewith," should be "executed" by the undertakers. All this they did.

Furthermore, by 5 & 6 Vict. c. 55, s. 6, the public department concerned was empowered and bound to inspect the bridge and works connected with it along with the rest of the undertaking. If the officers appointed should report that, in their opinion, the opening of the railway would be attended with danger to the public using the same, by reason of the incompleteness of the works or permanent way, then the department had the power and duty of preventing the railway from being opened for traffic until it should appear "that such opening may take place without danger to the public." In my opinion, incompleteness here covers the case not

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merely of a bridge designed to be strong enough but not yet fully executed or completed, but also of a bridge which, though fully executed according to the design, is incomplete because neither the design nor the execution has provided strength sufficient to bear the load : see per Jessel M.R. in *Attorney-General* v. *Great Western Ry. Co.* (1) Further, the "public" in question was clearly not confined to the members of the public who were to use the railway undertaking by passing under the bridge in trains, but included those who were to use it by passing above the trains by means of the bridge, and the danger was not confined to their persons, but extended to their goods, their vehicles, their draught animals, and so forth. On the face of this section the statutory duty which it imposes could not be performed unless the officials engaged had a full and proper opportunity of knowing the mode of construction of the bridge and of judging thereby its sufficiency for the statutory object. Mr. Vernon, for the respondents, very pertinently showed, by reference to existing Board of Trade regulations used in practice by the department, that, as might be expected, requirements can be and are formulated which enable its officials to judge, among other things, the strength and durability of such a structure, and the drawings supplied by the parties to your Lordships with the record show that the plans actually deposited during the construction gave ample materials for criticizing the strength of the bridge.

My Lords, when the bridge was executed in or shortly before 1867 all these requirements were complied with : its height and width and ascent or descent were in accordance with the relevant sections of the Act, and the public officials concerned declared themselves satisfied. Accordingly I am unable to see how it can be said that the bridge was not "executed" in accordance with the section. No question has arisen until recently as to the strength or sufficiency of the bridge. It carried the public highway across the railway, and did so efficiently, not only when the railway was opened but, as is admitted on all hands, for many years thereafter.

Changes have now taken place of a sort with which we are all familiar. The judgment of Warrington J. describes the traffic, which the relators assert that the bridge ought to be able to carry, as

(1) (1877) 4 Ch. D. 735, 739.

" heavy motor traffic," by which I understand not that the traffic of motor cars is heavy because many motor cars pass along the road, but that the traffic crossing the bridge includes heavy motors, self-propelling vehicles of a weight and energy that cause a particular strain on the bridge. The appellants' case is that, even if the bridge was duly " executed " in 1867, the respondents are now bound and compellable by law to maintain the bridge in such a fashion that it will safely carry such traffic ; nay, more, that they are bound, in case of need, to reconstruct the bridge for the purpose, and so on, whenever hereafter further mechanical discoveries bring into use heavier and heavier vehicles, or such as in any other way load and strain the bridge beyond its capacity for the time being.

My Lords, such a contention cannot, in my opinion, be rested on the word " execute." There are no words which expand this into " re-execute to a higher standard in the future." Nor can I think that it comes under the obligation as to maintenance. The section requires the respondents (they are the successors to the original undertakers) to maintain such bridge as is required to be executed in the first instance—" such bridge . . . . shall be executed . . . . and at all times thereafter maintained at the expense of the company." " Maintain " does not naturally mean maintain and alter, nor does " maintain such bridge "—namely, the bridge previously executed—naturally mean maintain it not as it was executed, but as something indefinitely different, stronger, more durable, and possibly of wholly dissimilar structure, material, or design. It is said that this meaning, which I venture to call unnatural, is imposed on the words used, both as to execution and maintenance, because " such bridge " is to be the means of carrying such road over the railway. So it is ; but, so far, there is nothing to show that such road is anything more than the physical road known about 1866, apparently, as " Crouch End Hill." The argument proceeds that, in relation to that road, the common law conferred on the public certain rights and imposed corresponding duties on the road authority, extending to a progressive improvement of the road as and when the growth of heavy motor traffic might require ; that nothing in this section shows any intention on the part of the Legislature to lessen those rights or those duties ; and that, as the bridge is but a new link in the line of the old highway, the contrary

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intention must be presumed. Hence the duties of the highway authority must, in respect of the part of the highway which the bridge carries, be deemed to have been transferred to the respondents as owners of the bridge.

My Lords, to this contention I think the short answer must be that the section is concerned with a physical thing to be executed in praesenti and to be maintained in futuro, and it is engaged in telling the undertakers what they are to do then and there. Having done so, it clearly adds, "that which is hereby directed to be made shall at all times thereafter be maintained." Maintenance is, in itself, a word which is not indicative of but negatives change. What is maintained is a status quo. It does not point to a higher standard of attainment. Except that by implication it assures to the public the same measure of dedication as a free highway or of accessibility as a turnpike road as had previously attached to the road, formerly carried on solid earth and now carried by means of a bridge, I do not think the section has any concern with the duties of road authorities as such, or of public bridge authorities as such. The section is an adoptive section. It assumes a special Act of Parliament authorizing a line of railway to be carried across the line of a highway, with which Act it is incorporated. The section is in terms applicable equally to turnpike roads as to public highways. It takes no account of subsequent events, such as the disturnpiking of the road. It applies to the roads as they are. Possibly it may be that in the result the public now loses some advantages in respect of Crouch End Hill which it would have enjoyed if the Railways Clauses Consolidation Act, 1845, had never passed or the railway in question had never been made. This cannot be helped. The statute will have it so. If the Legislature in 1845 did not see ahead beyond the end of the century, it, at any rate, exercised a degree of foresight that has not always been equalled in public affairs.

My Lords, I think that the contention of the relators fails. I have arrived at this conclusion on the bare language of the section itself, but I conceive that it is also involved in your Lordships' decision in the *Sharpness Case* (1) last year. There, as here, the undertaking was laid out along a line intersecting sundry public highways. There, as here, the Legislature prescribed for the undertakers

(1) [1915] A. C. 654.

expressly what they were to do and, by implication, what they need not do. This is what is called a code. There, as here, they were to carry the roads over the canal by means of bridges. There certain commissioners were to say affirmatively what those bridges were to be in dimension, strength, and design ; here the Legislature fixes some of these particulars, and empowers a public department to fix the rest negatively by bringing the undertaking to a stand unless it is satisfied. This merely varies the mechanism. It does not affect the principle. In each case the Legislature prescribes a bridge for present erection and future maintenance. It says "Do this and your duty is done." By what precise steps or from what sources the particulars of the works to be executed are prescribed cannot be material, as soon as they are ascertained.

My Lords, in the course of the argument a good deal was contended for as to the duties of road authorities in regard to new traffic over a bridge forming part of a highway, to which I should not be disposed to assent without further consideration, nor do I, for my own part, wish to be taken as expressing any opinion, except on the construction of s. 46 of the Railways Clauses Consolidation Act, 1845. I agree that the appeal ought to be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed; the appellants, the relators, to pay the costs of the appeal.

Lords' Journals, July 21, 1916.

Solicitors for appellant : *Joynson-Hicks, Hunt, Moore & Cardew.*
Solicitor for respondents : *R. Hill Dawe.*

[HOUSE OF LORDS.]

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BOORD AND SON (INCORPORATED) . . APPELLANTS;

AND

BAGOTS, HUTTON AND COMPANY, LIMITED AND ANOTHER . . . . . RESPONDENTS.

Trade Mark — Registration — Similarity of Device — "Calculated to deceive"—"Cat" Mark for Gin—Publici Juris—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 19, 40.

An application to register in class 43 for gin a trade mark consisting of a pictorial label, of which the prominent feature was the representation of a cat in a sitting posture got up as a puss in boots, was opposed by the registered proprietors of an old trade mark for gin, consisting of the device of a cat standing on a barrel, on the ground that under this trade mark in the Eastern markets, where the opponents had acquired a great reputation, their goods had become known as "Cat" goods, and that the registration must cause confusion. The device of a cat per se had become publici juris in this country in connection with gin, and the applicants disclaimed any right to the exclusive use thereof:—

Held, that the applicants' mark was not calculated to deceive, there being no resemblance between the two marks, and that the mere possibility of confusion arising from the insufficient description of the opponents' mark by ignorant people in foreign markets was not a ground for refusing registration.

Decision of the Court of Appeal [1916] 2 Ch. 103 affirmed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Neville J.

The respondents, Bagots, Hutton & Co., Limited (hereinafter called the respondents), applied under No. 340,438 for registration as a trade mark for gin in class 43 of a pictorial label of which the principal feature was a representation of a cat got up as a puss in boots sitting on the snow and holding in its fore-paws a glass. On the snow on the one side of the cat was a glass bottle and on the other side a feathered hat. In the upper portion of the label were

* *Present:* LORD BUCKMASTER L.C., EARL LOREBURN, VISCOUNT HALDANE, and LORD ATKINSON (present during the argument only).

(1) [1916] 2 Ch. 103.

the words "Cordial Old Tom Gin, Snowdrop, Trade Mark." The application was opposed by the appellants on the grounds that they were the registered proprietors of various trade marks for gin and similar goods bearing representations of a cat; that as a consequence their goods had become known in the United Kingdom and in the markets of the world by the name "Cat Brand"; and that the trade mark which the respondents were seeking to register was calculated to cause the goods bearing the same to be described as "Cat Brand" goods and to be passed off as and for the appellants' goods. The respondents by their counter-statement alleged that the most conspicuous feature of all the appellants' trade mark was a combination of a cat and a barrel and that the appellants had no right to the exclusive use of a cat, and they denied that the appellants' goods had become known as "Cat Brand."

In 1879 the appellants' predecessors in title registered under No. 20,505 as an old mark for "fermented liquors and spirits, namely, wine, whisky, liqueurs," a label containing a representation of a cat standing on a barrel and having one of its fore-legs raised. On the barrel and on the cat's collar were the words "Old Tom." Underneath the barrel in a circular band appeared the words "Cordial Old Tom" and in the centre of the circle the name of the firm, "Swaine, Boord & Co., London." The applicants claimed a user of twenty-five years before the date of application. In 1904 the appellants registered under No. 257,764 as an old mark for gin a precisely similar label, except that the name "Boord & Son" was substituted for "Swaine, Boord & Co." In that and subsequent years they also registered various representations of a cat and barrel, sometimes in conjunction with their name and sometimes without, as trade marks for gin or goods including gin (Nos. 257,763, 260,890, 261,362, 263,113, 281,227).

The appellants were among the largest gin distillers in the United Kingdom, and they and their predecessors had carried on business since 1744. In 1849 the appellants' predecessors began to export Old Tom gin to many parts of the world, and for that purpose they invented their trade mark of a cat standing on a barrel, and they had since built up a large trade under that trade mark. They adduced a very large body of expert trade evidence to the effect that their goods were known all over the world, and especially

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in the Eastern market, as "Cat" gin or "Cat Brand" gin, or sometimes, but more rarely, as "Cat and Barrel" gin, and were constantly ordered under those names or their foreign equivalents.

The respondents were wine and spirit merchants of Dublin, and in 1911 they purchased from the liquidator of Kinahan & Co., Limited, which was in liquidation, the business of that company together with its British labels and trade marks, registered or unregistered, including the trade mark now in question. Kinahan & Co. were wine and spirit merchants of Dublin, and they dealt in gin, but their principal business was in Irish whisky.

The respondents' case was that the representation of a cat per se in connection with gin had become publici juris. They proved that several marks bearing the device of a cat had been registered in class 43 both before and since the appellants' registration (although in some cases the appellants by means of agreements with the registered proprietors had obtained the cancellation of these marks) and that numerous proprietary and stock labels bearing the device of a cat had been supplied to and employed by merchants for use in connection with gin. They also proved that they and their predecessors in title had used their said mark both for home and export trade without complaint or interference by the appellants since the year 1890, and that no case of deception was alleged to have occurred.

The evidence, which was very voluminous, is sufficiently set out in the judgment of the Lord Chancellor.

The application for registration was heard by the Comptroller-General. The respondents (the applicants) having in the course of the hearing expressed their willingness to disclaim any right to the exclusive use of a cat per se, the Comptroller-General ordered the mark to be registered with that disclaimer.

Neville J., on appeal, held that the respondents' mark was calculated to deceive and that the registration ought to be disallowed, but his judgment was reversed by the Court of Appeal (Lord Cozens-Hardy M.R., Phillimore L.J., and Joyce J.).

In the course of the argument before the House counsel for the appellants conceded that the respondents' mark was not calculated to deceive in the United Kingdom.

1916. March 13, 14, 17, 20. *P. O. Lawrence, K.C.*, and *A. J. Walter, K.C.* (with them *Sebastian*), for the appellants. The appellants do not object to the user of the respondents' mark in England, and they admit that the cat mark is open to the trade in the home market, but they object to the registration of the mark because it will enable the respondents to use it in foreign markets where the cat mark has become identified with the appellants' goods. A trade mark will not be registered if in any part of the world the user of the mark will cause deception owing to the fact that another trader has built up a reputation for his goods under that mark. To the eye the two marks are quite distinct; but deception may take effect through the ear as well as through the eye, and where the goods of a trader have by the use of a trade mark become known by a particular name the adoption by a rival trader of any mark which will cause his goods to be called by the same name is objectionable: *Seixo* v. *Provezende* (1); and this principle applies although the goods may have acquired the particular name in the Colonies only: *Orr Ewing & Co.* v. *Johnston & Co.* (2); *In re the Trade Mark of La Société Anonyme des Verreries de l'Etoile* (3); *In re Dewhurst & Sons' Trade Mark.* (4) A trade mark ought to be refused registration where it is not clear that deception may not result. The test is not the same as upon an application for an injunction: *Eno* v. *Dunn.* (5) The only substantial distinction between this and the *Orr Ewing Case* (2) is that in that case the mark was adopted deliberately; but if a mark is calculated to deceive intention is immaterial, except that from intention it may be inferred that the attempt to deceive is likely to be successful. Phillimore L.J. relied on the dictum of Lord Selborne L.C. in that case, where the Lord Chancellor declined to assent to the proposition that a ticket which was the rightful and bona fide trade mark of the trader using it could be excluded by injunction from particular markets (though unimpeachable everywhere else) merely because in those markets it might be liable to be called by a name which the mark of another trader had already acquired there. But on principle the answer to

(1) (1866) L. R. 1 Ch. 192.
(2) (1880) 13 Ch. D. 434; 2 Ch. 26. (1882) 7 App. Cas. 219.
(3) [1894] 1 Ch. 61, 64; [1894]
(4) [1896] 2 Ch. 137.
(5) (1890) 15 App. Cas. 252.

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that dictum is that no trader, however lawful his user may be in one place, has a right to take away the reputation acquired by another trader in another place. Further, the dictum was obiter only, and had reference not to registration, but to injunction; but a mark may be refused registration although no case may be made for an injunction.

In re Dexter's Application (1), upon which Phillimore L.J. further relied, is also distinguishable. That decision proceeded on the footing that the word "star" was a laudatory word and that in connection with tobacco the word or figure of a star was common to the trade, but it was not there proved that the device of a star was not common to the trade in one of the biggest markets in which the commodity was sold. Here the device of a cat is common only to a particular section of the trade, namely, the trade in the United Kingdom. "Common to the trade" does not mean common to a portion of the trade.

Colefax, K.C., and *Hunter Gray*, for the respondents. That which is publici juris is not a ground for objection to registration: *In re Dexter's Application* (1); *Payton & Co.* v. *Snelling, Lampard & Co.* (2) In *Johnston & Co.* v. *Orr Ewing & Co.* (3) Lord Selborne carefully excludes the case where the defendant had the right to use the mark but it might happen that in some foreign market the mark had become vocalized, and so the defendant's mark might lead to confusion. Moreover, that was an ordinary passing-off case. Registration in England ought not to be refused by reason of a possibility of deception in India. Then it is said that registration will give the respondents the right to use the mark in the foreign markets. It confers no such right: *In re Lyle and Kinahan's Application*, per Buckley L.J. (4) The only benefit derived from registration here is that in some countries, of which Germany is the chief, registration will not be granted to a foreign trade mark unless it has been registered in the country of origin. Where two trade marks are obviously distinct the onus is on the opponent to prove that the mark sought to be registered is calculated to deceive in some particular foreign market. It may be that *In re Dewhurst & Sons'*

(1) [1893] 2 Ch. 262.
(2) (1899) 17 Rep. Pat. Cas. 48; [1901] A. C. 308.
(3) 7 App. Cas. 219.
(4) (1907) 24 Rep. Pat. Cas. 249, 262.

Trade Mark (1) went too far, but it purported to follow *In re the Trade Mark of La Société Anonyme des Verreries de l'Etoile* (2), which proceeded on the principle that if words are sought to be registered which would convey the same meaning as any symbol which had been previously registered they cannot be registered as an essential part of a trade mark.

Sir George Cave, S.-G., and *Austen-Cartmell*, for the Registrar of Trade Marks.

A. J. Walter, K.C., replied.

The House took time for consideration.

July 25. LORD BUCKMASTER L.C. (3) My Lords, in this case the appellants seek to prevent registration of a trade mark which the respondents have used in this country for at least seventeen years, upon the ground that, if registered, it would be calculated to deceive.

For the purposes of this appeal the appellants admit that there is no likelihood of deception in the United Kingdom, but they say that this is not the case in some of the Eastern markets, and notably in India, China, and Singapore. In order to value the weight of this contention it is necessary to examine the character and meaning of the mark and the circumstances attending the trade in pursuit of which it is said that the deception will arise.

The trade in question is the trade of selling gin, and the respondents' mark is one which has as its prominent feature the picture of a cat sitting on the snow, attired in the fancy garments usually associated with puss in boots, and pouring the last drops out of what appears to be an empty gin bottle. The mark of a cat in connection with sweetened and cordialized gin in this country has been long established and used by many persons and firms. It appears to have arisen from the fact that a Mr. Thomas Chamberlain, some time in the eighteenth century, devised a particular form of sweetened gin which attained great popularity ; and after his death, in his affectionate remembrance, this drink was described and sold as "Old Tom." Whether it was that, as the memory of this inventor became more faint, "Old Tom" conveyed the idea

(1) [1896] 2 Ch. 137. (2) [1894] 2 Ch. 26.
(3) Read by Earl Loreburn.

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of a cat and not of a human being, or whether, as the appellants assert, the idea was conceived of a punning use of the name by applying it to a cat, and thus making the animal symbolize the liquor, does not arise here for decision. It may be accepted, as the appellants state, that it was to their predecessor in business that the changed meaning of the phrase " Old Tom " is due. But however that may be, in this country, at least, it is not disputed for the purpose of this appeal that " Old Tom " is the description of a drink, and not a name associated with goods the product of a particular manufacturer, and that in the home markets this name is often symbolized by the picture of a cat.

The appellants themselves have for a long time had a mark, of which a cat on a barrel is a prominent feature. They had used this mark for many years before 1879, and they then registered it under the Trade Marks Act of 1875 as applicable to fermented liquors, namely, wine, whisky, and liqueurs. They did not specifically register it as applicable to gin ; but in 1904 it was registered as a mark for gin, and it was then stated that the mark had been used by the appellants and their predecessors in business continuously, in respect of the said goods, since upwards of twenty-five years before the 13th August, 1875.

So far as the probability that deception owing to the resemblance of the two marks could occur, it is sufficient to say that a mere glance is sufficient to dispel any such apprehension. The case has not suffered from lack of evidence on behalf of the appellants, and their witnesses have not failed in courage, but no one has ventured to say that one mark could reasonably be mistaken for the other. The respondents, therefore, are perfectly entitled to register their trade mark for the goods in connection with which it has been used so far as the United Kingdom is concerned ; and the real question for determination is whether that right is lost because the appellants have penetrated into markets far removed from this country, where the respondents' goods have not yet found their way.

So far as the appellants' witnesses establish facts, as apart from expressing opinions and views, these facts may be stated most favourably to the appellants by saying that in the special markets to which I have referred their goods are known as " goods with the cat brand," and that when a resident in those countries—whether a

trader, merchant, or a consumer—desires to obtain the appellants' gin, it is frequently referred to as "Cat" gin. The appellants, therefore, say that in those countries any goods which were sold under a trade mark of which a cat was a prominent feature would enable traders to use such goods for the appellants' in answering demands for Cat Brand or Cat Brand gin. After a careful scrutiny of the statements of all the witnesses I am unable to arrive at that conclusion. The appellants' evidence is voluminous. It is, as for convenience' sake evidence in cases such as these must frequently be, couched in general and common phrases; but it is open to a very serious challenge. The original opposition to registration was based by the appellants upon the ground that their goods were known throughout both the United Kingdom and the markets of the world by names derived from their trade mark, and in particular by the name "Cat Brand," and that they were frequently spoken of as "Cat Brand people," and it was in support of this objection that the evidence was filed.

Now the greater part of the witnesses do attempt to establish these grounds of opposition, and draw no distinction between the United Kingdom and other markets. They associate the name "Cat Brand" with the appellants' goods wherever sold and the name "Cat Brand people" with the appellants wherever that phrase is used. The evidence of Mr. Burke—the secretary to Messrs. Gilbey—is a good sample of this evidence. He makes no distinction at all between the use of the phrase in this country and elsewhere, and, indeed, his evidence rather suggests that the phrase is better established here than it is in foreign countries. I extract the first paragraph of his evidence for the purpose of showing what I mean: he says "I have had thirty-eight years' experience in the trade, and my company are the largest wine and spirit merchants in the United Kingdom. They are also distillers and rectifiers. Messrs. Boord & Son are among the first distillers in this country. Their trade mark is a cat on a barrel. This is vocalised as 'Cat' in different forms, such as 'Cat Brand,' 'Cat Mark,' 'Old Tom Cat Gin,' and so on. A more lengthy way of referring to Messrs. Boord's mark and brand which is sometimes used is 'Cat and Barrel,' but shorter forms are more generally used. Messrs. Boord & Son are similarly spoken of on the markets as the 'Cat people.'"

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It is true that he guarded himself against saying that the labels would be mistaken in this country, because he says the people here will read the name and the printed matter, but he adds it is different in colonial and foreign markets. He continues: "Messrs. Boord & Son's mark is referred to as 'Cat Brand' abroad as well as here, and if any other firm had a label of any kind with a cat on, they would derive benefit from Messrs. Boord & Son's reputation."

There are numbers of other deponents who speak to this effect in similar terms, but one or two speak specially with regard to the foreign markets. Now, so far as that evidence relates to this country, its effect is completely overthrown by the evidence adduced by the respondents; and this it is that has caused the appellants to abandon—at any rate, for the purpose of this appeal—the whole area of the United Kingdom as included in the area where deception might arise.

Your Lordships were urged by the counsel for the appellants not to let this circumstance have too great influence in criticizing the evidence with regard to the Eastern markets, which they say is practically unchallenged. It must always be a difficult matter to erase from one's mind the feeling of uncertainty as to evidence which is couched in bold, strong terms as to two matters and is found untrustworthy as to one. The fact that the witnesses have been mistaken on the one hand may easily lead to their being mistaken on the other; but apart from this circumstance, I have done my best to give full weight to all that the appellants' witnesses say with regard to Oriental trade, and I find myself unable to accept the conclusion which they draw. As an instance of what I mean I will quote the evidence of Mr. Reeve. Paragraph 6 of his affidavit is in these terms: "Gin is drunk to a great extent in the East and is used enormously to make cocktails. In Eastern markets it is very difficult to get a new brand taken up, as consumers insist upon having an established and reputable brand of goods on which they can rely for purity and quality. They look to the picture they know, or which corresponds to the name they know. It is a much easier thing to sell a new make which bears a similar mark or device to that on an established brand or a sufficient resemblance to enable the consumer to say 'Oh! that's the cat! That's what I want.'"

And again, Mr. Havill, in paragraph 2, says: "The trade mark

of Boord's which contains a cat is well known, and in speaking of it people refer to it as 'Cat Mark' or 'Cat Brand.' The cat is the principal feature of Boord's label. From my knowledge of the markets here and in India and the East I am able to say that the natives buy goods altogether on the mark, and not by the name of the manufacturer or proprietor."

The result of this evidence, therefore, establishes no more than this —that the natives buy according to the mark and not according to the words, and that they look to the mark for the purpose of seeing what it is they buy. If they really look to the mark, deception is impossible, and the only way in which it could arise would be because people would ask for goods as the "Cat" or "Cat Brand goods," and traders, knowing that these phrases meant the appellants' goods, would deliberately supply goods that were not the appellants' simply because the label happened to bear the mark of a cat, though it was totally distinct from the cat which forms part of the appellants' device, and these goods would be accepted without question as the appellants' goods.

I see no reason to attribute such conduct to the dealers, nor such innocence to the consumers, and if it occurred the wrong done to the appellants would be one for which they would have to seek a remedy in the Courts within whose jurisdiction the offence was committed. There is, to my mind, no reasonable probability of any such deception arising, nor will the registration of the mark place in the hands of dishonest traders a ready means of furthering a course of deceit.

There is one further piece of evidence to which I should refer. The respondents have been selling their gin in Hamburg with the trade mark for which they desire registration, and have advertised it with a circular in which in three places they identify their gin as the gin with the cat, and this, it is said, shows the conduct of the respondents to get the benefit due to the name which the appellants have made famous in connection with their goods. I do not draw from that circular the inference that the appellants seek. The circular contains the actual trade mark of the respondents, and the words "With the cat" to my mind mean no more than with the particular cat which is found upon that mark.

Upon this view of the case it becomes unnecessary to decide

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whether, if an actual liability to deception were established in foreign markets, that would be a sufficient circumstance to prevent the registration in this country of an old and honest trade mark.

There is no doubt that the Courts here would stop in its inception a fraudulent practice which it was intended to complete in another country. The case of *Johnston & Co.* v. *Orr Ewing & Co.* (1) is an excellent illustration of such a case, but it depends throughout upon the view that the mark which the applicant there sought to register had been adopted by him with the deliberate purpose of causing the goods sold under it to be mistaken for the goods of the opponent in the markets in India. That case is of no assistance to the appellants in the present dispute. Nor, again, are the cases of *Dewhurst* (2) and *In re the Trade Mark of La Société Anonyme des Verreries de l'Etoile* (3), on which also the appellants rely. It is true that in both those cases the registration of the trade marks was refused on the opposition of a trader whose sole or principal trade under his own mark lay entirely out of the jurisdiction. But careful examination of the authorities will show that this was not the basis of the judgment, but that both the cases depended upon this—that where a mark (in the one instance a star and in the other a golden fan) was properly registered in this country, no person would be allowed to register the phonetic equivalent of these marks, even though the words were veiled in the obscurity of an Oriental language.

In my opinion the judgment of the Court of Appeal was perfectly right, and this appeal should be dismissed with costs.

EARL LOREBURN. My Lords, I think the registrar was right in registering this trade mark. It was not calculated to deceive any one in the United Kingdom. If it were proved that some use were about to be made here of some trade mark in order to deceive persons elsewhere, a Court in England might restrain a step in a course of deception. But even then I do not see why registration here should be refused of a trade mark otherwise suitable to be registered and proper to be registered. It is the business of a Court, not of the registrar, to prevent the abuse, and the abuse lies not in legitimate registration, but in dishonestly using the trade

(1) 7 App. Cas. 227. (2) [1896] 2 Ch. 137.
(3) [1894] 2 Ch. 26.

mark. It might be different if registration were merely a step in a fraud and nothing more.

Your Lordships were asked to believe that the Oriental mind has so associated cats with the appellants' goods that the presence of a cat in any posture and in any surroundings on a trade mark would in Eastern countries cause goods sold under such a mark to be mistaken for the appellants' goods. I do not believe that the Oriental is so undiscerning, and certainly it is not proved. If it were proved, then it would be the duty of a Court, possessing jurisdiction in whatever country a deception were alleged, to decide whether it ought to interpose, having regard to the law of the place or places where the wrong, if any, had been committed or was intended. I should think that such a Court would probably consider, among other things, whether or not a British trader who shared with others the right of using a cat on his trade mark in England could prevent those others from using a cat in some other country merely because that trader had been the first to introduce into that country goods under the familiar cat trade mark. I should need to know the facts of the case, but if there were no dishonesty I do not at present think he could prevent it according to our law.

In any case there can be no ground for saying that a trade mark otherwise appropriate for registration here should be denied registration because it may be unfairly used somewhere else.

VISCOUNT HALDANE. (1) My Lords, I think that the conclusion come to by the Court of Appeal was right and ought to be affirmed.

The appellants' trade mark is not a cat, but a cat on a barrel, and the appellation of their brands ought properly to be "Cat and Barrel" brands, and not "Cat" brands. To the more general appellation they are not entitled. There have been and are other firms who have also registered trade marks containing a cat as a prominent feature. For the purposes of this case it may indeed be taken that any one is at liberty in describing his goods to use the effigy of a cat, so long as he avoids its use in a combination so resembling the combination adopted by some other person as to be likely to deceive.

The respondents' trade mark has been used by them for some years,

(1) Read by Lord Wrenbury.

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Viscount Haldane.

although it is only now that they have applied to register it. The design contains the representation of a cat, but with such differences in form and surroundings from the representation adopted by the appellants that no ordinary person would confuse them. It is, however, said for the appellants that, although confusion is not likely so far as this country is concerned, there are certain markets in the East where the gin which the appellants manufacture is ordered by the natives under the designation of "Cat Brand" gin by reason merely of the association in the native mind of the cat appearing in their trade mark as a prominent feature of the design with the popular manufacture of the appellants. Now, if it were proved that the respondents had sought to take advantage of the reputation of the appellants by sending out other gin and passing it off as the gin manufactured by the latter, by using the representation of a cat for this purpose, the appellants might well have been entitled to an injunction. But the injunction in such a case would have been granted, not on the ground of infringement of trade mark, but to prevent cheating. There is, however, no evidence that the respondents have done or are threatening to do anything of a fraudulent kind. They have not so far sent gin at all to these particular markets in the East. An action to restrain passing off will not lie under the only circumstances that are before the House. The true question is whether on the principle of res ipsa loquitur or on the declarations by expert witnesses put in by the appellants to the effect that there is a likelihood of the natives and other buyers in the East being misled by the fact that the respondents' design contains a cat, the representation of which may cause confusion, though it does not per se infringe the appellants' trade mark, the appellants are entitled to say that the registration now of the respondents' mark, notwithstanding that it has been in use here for many years, ought to be regarded as calculated to deceive the public elsewhere.

My Lords, it seems to me plain that this question ought to be answered in the negative. The respondents are not seeking to register a design which is in itself deceptive. What may or may not mislead the natives is their failure to observe that the title "Cat Brand" applied to the appellants' gin is in reality an insufficient description. This looseness of practice ought not, it seems to me, to be regarded as imposing any duty on either the respondents or the

Registrar of Trade Marks. It is simply not relevant on an application for registration in the absence of anything to show intention either directly to deceive or to adopt a mark calculated in itself to mislead. If the trade mark itself had been practically copied, as was the case in *Johnston & Co.* v. *Orr Ewing & Co.* (1), it would be easy to infer deception as a natural and probable consequence and to conclude that the defendants should be checked. But, if the trade marks are really distinct, independent evidence of intention to deceive is necessary to give grounds for interference with what would otherwise be a right. In *Johnston & Co.* v. *Orr Ewing & Co.* (1) Lord Selborne, distinguishing a case in which the marks might be different, used language which seems to me to lay down a principle on which, where applicable, not only ought an injunction to be refused, but the registrar ought not to refuse registration of a new mark: "Your Lordships are not called upon to decide whether a ticket, which was a rightful and bona fide trade mark of the trader using it, could be excluded by injunction from particular markets (though unimpeachable everywhere else) merely because in those markets it might be liable to be called by a name which the mark of another trader had already acquired there. To that proposition I should not myself, as at present advised, be prepared to assent." In other words, an essential element of the title to restrain the use of the mark on the goods would be absent. What Lord Selborne said was under the circumstances a mere dictum, but I think that in this dictum there is expressed the real principle which ought to govern the present case. The registrar ought never to register a trade mark which on its face indicates design, or which is proved ab extra to be designed, to facilitate the passing off of one man's goods as the goods of another. On the other hand, in the absence of evidence, intrinsic or extrinsic, of such design, he ought not to hold the new mark to be calculated to deceive in a case where the two marks are quite distinct and where registration would be permitted but for the mere possibility of confusion by inexperienced people. For in such a case confusion is likely, not because of the character of the actual marks, but because the goods sold may be confused by reason of the original manufacturer having appropriated a description wider than that to which the mark he has

(1) 7 App. Cas. 219, 227.

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registered entitled him. A right to restrain passing off may arise out of other circumstances which are not deprived of their significance by reason of mere distinctness of trade mark. A man may be restrained in special circumstances from selling goods even under his own name. It may be a way of committing fraud. But such cases always depend on evidence being given of intention to deceive. They are widely different from the general question which, in the absence of evidence of an attempt at such deception, the registrar has to consider, on an application for the exercise of his discretion, on the judicial principles which must guide him. I think that the law on this point was correctly laid down by Wright J. in *In re Dexter's Application.* (1) Speaking of a particular feature in a design which he held to be a feature publici juris, he held that registration should not be refused for a new trade mark incorporating it merely because people might be misled by ignorance into construing its presence as signifying that the goods which bore it were the goods of another person who had previously incorporated that feature without any exclusive right to do so.

My Lords, the difference in character ought always to be borne in mind between the question in a case where a man is trying to deceive by passing off his goods as those of another and the question of interference with proprietary right, which is what the registrar has in the first instance to consider in deciding whether registration ought to be allowed of a trade mark bearing some resemblance to another. If this difference in the questions is attended to, I think that it will be found that the authorities cited at the Bar on this appeal can, in the main, be classified and reconciled. It is for the most part where the difference has been forgotten that obscurity in expression has arisen.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 25, 1916.

Solicitors for appellants: *Halse, Trustram & Co.*

Solicitors for respondents: *John Bartlett & Sons.*

Solicitor for Registrar of Trade Marks: *Sir R. Ellis Cunliffe (Solicitor to the Board of Trade).*

(1) [1893] 2 Ch. 262.

[HOUSE OF LORDS.]

F. A. TAMPLIN STEAMSHIP COMPANY, LIMITED . . . . . } APPELLANTS ;

AND

ANGLO-MEXICAN PETROLEUM PRODUCTS COMPANY, LIMITED . . . . . } RESPONDENTS.

H. L. (E.)*
1916
July 24.

Applied. BRIT MOVIETONEWS v. LONDON AND D TRICT CINEMAS L [1952] A.C.

Charterparty—Tank Steamship—Time Charterparty—Employment for Carriage of Oil as Charterers should direct—Liberty to sub-let on Admiralty or other Service—Requisition of Steamship by Admiralty —Employment for Transport of Troops—Restraint of Princes—Frustration of Adventure—Termination or Suspension of Charterparty.

By a time charterparty a tank steamship was chartered for sixty months to be employed in such lawful trades for voyages between any safe ports within certain limits for the carriage of oil as the charterers or their agents should direct. The charterers were to pay for the use and hire of the vessel a fixed sum per month. The charterparty contained an exception (inter alia) of arrests and restraints of princes, and the charterers had the liberty of subletting the steamer on Admiralty or other service. After the outbreak of the war, when the charterparty had nearly three years to run, the steamer was requisitioned by the Admiralty, and after the necessary alterations was employed by them in the transport of troops. The owners contended that the charterparty had been determined by the requisition. The charterers, who were willing to continue the agreed freight, contended that the charterparty was still subsisting :—

Held by Lord Buckmaster L.C., Earl Loreburn, and Lord Parker of Waddington (Viscount Haldane and Lord Atkinson dissenting), that the interruption was not of such a character as that the Court ought to imply a condition that the parties should be excused from further performance of the contract, and that the requisition did not determine or suspend the contract.

Decision of the Court of Appeal [1916] 1 K. B. 485 affirmed.

APPEAL from a decision of the Court of Appeal (1) affirming a decision of Atkin J. (2) upon an award of an arbitrator stated in the form of a special case.

* *Present :* LORD BUCKMASTER L.C., EARL LOREBURN, VISCOUNT HALDANE, LORD ATKINSON, and LORD PARKER OF WADDINGTON.

(1) [1916] 1 K. B. 485. (2) [1915] 3 K. B. 668.

H. L. (E.)
1916
F. A. TAMPLIN STEAMSHIP COMPANY, LIMITED v. ANGLO-MEXICAN PETROLEUM PRODUCTS COMPANY, LIMITED.

The British tank steamship *F. A. Tamplin*, then building, was chartered by a time charterparty dated May 18, 1912, and made between the appellants as owners and S. Pearson & Son, Limited, of London, as charterers. It was agreed before the arbitrator that the respondents, the Anglo-Mexican Petroleum Products Company, Limited, were and were to be treated as the charterers, notwithstanding that the name of S. Pearson & Son, Limited, appeared in the charterparty.

The chartered period was sixty calendar months, commencing from the time when the steamer was placed at the charterers' disposal, which was December 4, 1912, and sixty calendar months would accordingly expire on December 4, 1917.

Under the charterparty the vessel was chartered for the carriage of refined petroleum and/or crude oil and/or its products, but with an option to the charterers to ship other suitable cargo, and the vessel was to be employed in such lawful trades as charterers or their agents should direct, within specified limits, excluding B.N.A. or Atlantic except for coaling, and Baltic or White Sea between October 1 and April 1. Hire was to be paid at the rate of 1750*l.* per calendar month (to be reduced to 1700*l.* at expiration of the first twelve calendar months); the whole reach and burden of the ship were to be at the charterers' disposal; the captain, although appointed by the owners, was to be under the orders and directions of the charterers as regards employment, agency, or other arrangements; and the owners were, if charterers should have reason to be dissatisfied with the conduct of the captain, officers, or engineers, on receiving particulars of the complaint, to investigate the same and if necessary make a change in the appointment. The charterparty contained the usual exceptions, including arrests and restraints of princes, rulers, and peoples. It was also provided that no goods contraband of war were to be shipped, and the steamer was not to be required to enter any port that was in a state of blockade, or where hostilities were in progress, and in the event of the country to which the steamer should trade being at war with any other country the charterers were to insure the steamer for owners' benefit against all war risks for the value under the present policies and to hand owners the policies. No voyage was to be undertaken or goods or cargoes loaded that would involve risk of seizure, capture, or penalty by

British or foreign rulers or Government; and no acids or cargoes injurious to the steamer were to be shipped. The charterparty contained the usual arbitration clause. It was also provided that the charterers were to have the liberty of sub-letting the steamer on Admiralty or other service without prejudice to the charterparty, but the charterers remaining responsible.

Early in December, 1914, the steamer was requisitioned by the British Government for Admiralty transport service, and under this requisition was engaged mainly in carrying fresh water in her tanks for His Majesty's Fleet until about February 10, 1915. No question arose as to this requisition.

Shortly before February 10, 1915, notice was given to the respondents, the charterers, by the Director of Transports that the steamer, which the British Government had expressed their intention of releasing from the previous requisition about the middle of January, was again requisitioned "from the time she arrived, has discharged and is ready." She arrived at Cardiff on February 10, 1915, and as soon as she was ready she proceeded, under orders given under the second requisition, to Liverpool, where she arrived on February 15, 1915.

Immediately after her arrival at Liverpool many structural alterations were made, and she was fitted for the transport of troops. These alterations were made by British Government contractors by direction of the British transport officers, and she was thereafter used for the carriage of troops. Shortly stated the alterations consisted in drilling a large number of holes in the deck, bulwarks, rails, poop, bridge, and forecastle for the purpose of fitting a complete awning deck built of wood from poop to bridge and bridge to forecastle.

The appellants, the owners, claimed that the charterparty had been determined (or suspended) by the requisitioning of the vessel by the British Government and by her structural alteration and conversion into, and use as, a troopship. The respondents, the charterers, who were willing to continue the payment of the agreed freight, contested this claim.

A dispute having arisen in the premises between the parties, it was referred by them to David Calder Leck, K.C., as sole arbitrator. He made his award in the form of a special case on June 4, 1915,

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and, subject to the opinion of the Court, awarded and directed that the charterparty came to an end on February 15, 1915, and stated the question for the Court to be whether on the facts found by him the charterparty came to an end when the steamer was requisitioned by the British Government or was suspended during the period of the requisition, or whether in any way the requisition affected the rights of the owners or charterers under the charterparty.

Atkin J. held that the requisitioning of the vessel did not put an end to or suspend the charterparty, and his decision was affirmed by the Court of Appeal (Lord Cozens-Hardy M.R., Bankes L.J., and Warrington L.J.).

1916. March 23, 24, 27, 28. *George Wallace*, *K.C.*, and *Norman Raeburn*, for the appellants. The use made of the ship since the requisition is not a use under the charterparty at all. The ship has been taken out of the hands of the parties by the Government, and neither party can perform his obligations under the contract. The owner is the servant of the Admiralty and he cannot maintain the service of the ship for the contract purpose. The whole basis of the contract was the carriage of oil; it was an implied term of the charterparty that the vessel should continue to be a vessel adapted for the carriage of oil, but the requisition has destroyed the vessel as an oil-carrying ship. The requisition has frustrated the commercial object of the adventure, and it therefore puts an end to the contract: *Jackson* v. *Union Marine Insurance Co.* (1); *Geipel* v. *Smith* (2); *Hudson* v. *Hill* (3); *Ford* v. *Cotesworth* (4); *Cunningham* v. *Dunn* (5); *Taylor* v. *Caldwell* (6); *Appleby* v. *Myers* (7); *Krell* v. *Henry* (8); *Horlock* v. *Beal* (9), where all the authorities are reviewed. This doctrine as to the destruction of the commercial adventure applies to a time charter as well as to a voyage charter: *Tully* v. *Howling*. (10) If this contract is not absolutely determined, at any rate it is suspended during the time that the ship is taken out of the control of the parties: *Hadley* v. *Clarke*. (11)

(1) (1874) L. R. 10 C. P. 125.
(2) (1872) L. R. 7 Q. B. 404.
(3) (1874) 43 L. J. (C.P.) 273, 278–9.
(4) (1870) L. R. 5 Q. B. 544.
(5) (1878) 3 C. P. D. 443.
(6) (1863) 3 B. & S. 826.
(7) (1867) L. R. 2 C. P. 651.
(8) [1903] 2 K. B. 740.
(9) [1916] 1 A. C. 486.
(10) (1877) 2 Q. B. D. 182.
(11) (1799) 8 T. R. 259.

Sir Robert Finlay, K.C., and *F. D. MacKinnon, K.C.* (with them *R. A. Wright*), for the respondents. The appellants fail on the facts to bring their case within the principle on which they rely. It is said that the contract is determined either by the outbreak of the war or by the requisition. But the owner loses nothing if at the end of the time he gets back his ship intact and in the meantime he gets his freight. On the other hand, it is the charterer who suffers because he cannot get his oil carried. As to the effect of the war, no doubt this contract was framed in the contemplation of the parties that this country should be at peace. But what is the effect of the supervention of war? So far as any one is affected it is not the owner, but the charterer. It is a startling proposition that the outbreak of war ipso facto puts an end to all British charterparties.

Then as to the requisition, the alterations did not make the vessel cease to be a tank ship. The only interest of the owner is to get his hire, which is preserved to him, and to insist that the vessel shall not be used in any way inconsistent with the purposes of the charter-party. The real point is the loss of the use of the vessel, and that is a question which affects the charterer. The supervention of the act of State is provided for by the exceptions in the contract. The doctrine as to frustration does not apply to a time charter, where there is no common adventure, or at any rate it does not apply to the circumstances of this case: *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* (1); *Braemont S.S. Co.* v. *Weir* (2); *Scottish Navigation Co.* v. *Souter & Co.* (3); *Modern Transport Co.* v. *Duneric Steamship Co.* (4) [They also referred to Carver's Carriage by Sea, 5th ed., s. 232.] *Jackson* v. *Union Marine Insurance Co.* (5) was a case of a voyage charter, and the ratio decidendi of that case is explained by Brett J. in *Hudson* v. *Hill* (6), where it was held that there was no frustration. The supervention of the superior power has not made the performance of the obligations of either party under this contract impossible, and therefore the doctrine of frustration of the adventure does not apply. [They also referred to *Brown* v. *Turner, Brightman & Co.* (7)]

(1) [1916] 1 K. B. 429.
(2) (1910) 15 Com. Cas. 101.
(3) [1916] 1 K. B. 675; 32 Times L. R. 234.
(4) [1916] 1 K. B. 726; 32 Times L. R. 180.
(5) L. R. 10 C. P. 125.
(6) 43 L. J. (C.P.) 273.
(7) [1912] A. C. 12.

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George Wallace, K.C., in reply. If something intervenes which goes to the root of the contract it makes no difference whether the charter is a voyage charter or a time charter. The recent decisions cited by the respondents are founded on the decision of the Court of Appeal in this case and carry the matter no further. It is said that the case is provided for by the exception of restraints of princes, but if the whole foundation of the contract is gone the contract comes to an end, and the exceptions with it: *Jackson* v. *Union Marine Insurance Co.* (1) The effect of the requisition must be judged by the light of subsequent facts, and those facts tend to show that the requisition was of a permanent character. On the other hand, it is not necessary to wait and see what is going to be the result at the end of the contract; but the matter must be looked at from a business point of view: *Esposito* v. *Bowden* (2); *Geipel* v. *Smith* (3); *Embiricos* v. *Sydney Reid & Co.* (4); *Horlock* v. *Beal.* (5) There has been here a complete departure from the contract on both sides for an indefinite time. It is sufficient if a substantial part of the contract is gone.

The House took time for consideration.

July 24. EARL LOREBURN. My Lords, I understand that the Lord Chancellor agrees with the opinion about to be expressed by my noble and learned friend Lord Parker. I now proceed to read my own opinion.

My Lords, it is unnecessary to repeat the narrative of what has happened in this case or to analyse again the charterparty. This ship was chartered for five years. She was to be managed and controlled by the owners, but the use to be made of her in carrying merchandise within prescribed limitations depended upon the direction of the charterers. From December, 1912, till December, 1914, she was employed accordingly. From that date till the hearing of the case she has been employed by His Majesty's Government for purposes connected with the war. There are therefore nineteen months of the five years unexpired. No one knows how long the Government will continue to use this vessel, but, so long as they do

(1) L. R. 10 C. P. 125.
(2) (1857) 7 E. & B. 763.
(3) L. R. 7 Q. B. 404.
(4) [1914] 3 K. B. 45.
(5) [1916] 1 A. C. 486.

use her, neither party to the contract can carry out their common adventure.

It may be as well to say that the first requisition of this ship was in December, 1914, and the second in February, 1915, but she was not released from the day she was first taken over.

In these circumstances the owners maintain that Mr. Leck's award, holding that this charterparty came to an end when the steamer was requisitioned in February, 1915, is right.

In order to decide this question it is necessary to ascertain the principle of law which underlies the authorities. I believe it to be as follows: When a lawful contract has been made and there is no default, a Court of law has no power to discharge either party from the performance of it unless either the rights of some one else or some Act of Parliament give the necessary jurisdiction. But a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree.

In the recent case of *Horlock* v. *Beal* (1) this House considered the law upon this subject, and previous decisions were fully reviewed, especially in the opinion delivered by Lord Atkinson. An examination of those decisions confirms me in the view that, when our Courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the

(1) [1916] 1 A. C. 486.

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cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

When this question arises in regard to commercial contracts, as happened in *Dahl* v. *Nelson, Donkin & Co.* (1), *Geipel* v. *Smith* (2), and *Jackson* v. *Union Marine Insurance Co.* (3), the principle is the same, and the language used as to "frustration of the adventure" merely adapts it to the class of cases in hand. In all these three cases it was held, to use the language of Lord Blackburn, "that a delay in carrying out a charterparty, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end." That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said "if that happens, of course, it is all over between us"? What, in fact, was the true meaning of the contract? Since the parties have not provided for the contingency, ought a Court to say it is obvious they would have treated the thing as at an end?

Applying the principle to the present case, I find that these contracting parties stipulated for the use of this ship during a period of five years, which would naturally cover the duration of many voyages. Certainly both sides expected that these years would be years of peace. They also expected, no doubt, that they would be left in joint control of the ship, as agreed, and that they would not be deprived of it by any act of State. But I cannot say that the continuance of peace or freedom from an interruption in their use of the vessel was a tacit condition of this contract. On the contrary,

(1) (1881) 6 App. Cas. 38. (2) L. R. 7 Q. B. 404.
(3) L. R. 10 C. P. 125.

one at all events of the parties might probably have thought, if he thought of it at all, that war would enhance the value of the contract, and both would have been considerably surprised to be told that interruption for a few months was to release them both from a time charter that was to last five years. On the other hand, if the interruption can be pronounced, in the language of Lord Blackburn already cited, "so great and long as to make it unreasonable to require the parties to go on with the adventure," then it would be different. Both of them must have contracted on the footing that such an interruption as that would not take place, and I should imply a condition to that effect. Taking into account, however, all that has happened, I cannot infer that the interruption either has been or will be in this case such as makes it unreasonable to require the parties to go on. There may be many months during which this ship will be available for commercial purposes before the five years have expired. It might be a valuable right for the charterer during those months to have the use of this ship at the stipulated freight. Why should he be deprived of it? No one can say that he will or that he will not regain the use of the ship, for it depends upon contingencies which are incalculable. The owner will continue to receive the freight he bargained for so long as the contract entitles him to it, and if, during the time for which the charterer is entitled to the use of the ship, the owner received from the Government any sums of money for the use of her, he will be accountable to the charterer. Should the upshot of it all be loss to either party—and I do not suppose it will be so—then each will lose according as the action of the Crown has deprived either of the benefit he would otherwise have derived from the contract. It may be hard on them as it was on the plaintiff in *Appleby* v. *Myers*. (1) The violent interruption of a contract always may damage one or both of the contracting parties. Any interruption does so. Loss may arise to some one whether it be decided that these people are or that they are not still bound by the charterparty. But the test for answering that question is not the loss that either may sustain. It is this: Ought we to imply a condition in the contract that an interruption such as this shall excuse the parties from further performance of it? I think not. I think they took their chance of lesser interruptions,

(1) L. R. 2 C. P. 651.

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and the condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance, or in other words impracticable, by some cause for which neither was responsible. Accordingly I am of opinion that this charterparty did not come to an end when the steamer was requisitioned and that the requisition did not suspend it or affect the rights of the owners or charterers under it, and that the appeal fails.

VISCOUNT HALDANE. (1) My Lords, the general principles by which this appeal must be decided do not appear to me to be difficult of ascertainment. The real uncertainty in the case lies in their application. As to this it is with reluctance that I find myself differing from the conclusions at which others of your Lordships have arrived.

When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is prima facie regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made. The principle applies equally whether performance of the contract has not commenced or has in part taken place. There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event (such, for instance, as in the case of the charterparty under consideration, restraint of princes) so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are

(1) Read by Lord Sumner.

deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation. If the course of events can be regarded as consistent with the continuance of the contract, it will follow that when the event possesses the more limited character there will, under the terms of the special stipulation, be mere suspension of particular rights and duties which would otherwise arise under the general terms agreed on. The circumstance that the contract is one not for a single service, but for a succession of such services, to continue for a definite time, is a relevant fact in considering whether there is a mere temporary suspension. And where the interruption is simply one of an interim character and likely to cease so soon as to leave the rest of the period stipulated free for the revival of the rights and duties of the parties after what amounts to no more than a temporary cessation of the power of performance, then, not only where there is an express stipulation covering the case which has occurred, but possibly even where there is no such stipulation, the contract may be regarded as not becoming destroyed but only suspended. The question must always turn mainly on the facts. But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as being wholly dissolved, and the Courts cannot take any course which would in reality impose new and different terms on the parties.

My Lords, on the general principle there is a long series of authorities, extending from the decision of *Paradine* v. *Jane* (1), more than two centuries ago, through such cases as *Taylor* v. *Caldwell* (2) down to the recent appeal to this House in *Horlock* v. *Beal* (3), in which last case many of the previous authorities were considered and classified. In the main the decisions given are consistent, although there are dicta which are not everywhere easy to reconcile. But the differences in expression which these authorities disclose do not affect the fundamental principles which they recognize, and I think that what I have ventured to state as the law is in accordance with the weight of judicial opinion. It was therefore

(1) (1647) Aleyn, 26. (2) 3 B. & S. 826.
(3) [1916] 1 A. C. 486.

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important to endeavour to formulate these principles in a case like the present, where the task of the tribunal is essentially one of ascertaining their true bearing on the particular facts of the case.

To these facts I now turn. By a charterparty dated May 18, 1912, on which the question arises, the owners of the tank steamer *F. A. Tamplin* agreed to let the steamer to the respondents as charterers for sixty calendar months from the date at which she was placed at the disposal of the latter, a term which would expire on December 4, 1917. The steamer was to be employed "in such lawful trades for voyages between any safe port or ports in the United Kingdom and/or Continent of Europe and/or any safe port or ports in the United States of America and/or Mexico and/or North and South America and/or Africa and/or Asia and/or Australasia and back, finally to a coal port in the United Kingdom, for the carriage of refined petroleum and/or crude oil and/or its products, but warranted no B.N.A. or Atlantic except for coaling; warranted no Baltic between 1st October and 1st April; warranted no White Sea between 1st October and 1st April, as charterers or his agents shall direct," on certain conditions. Among these was that the charterers should pay 1750*l.*, reducible later on to 1700*l.*, a month; that on the last voyage the charterers should, if the vessel had been carrying other than refined oil or spirit, clean the vessel, and load a cargo of refined oil or spirit on that voyage under the charter; that no goods contraband of war were to be shipped, and the vessel was not to be required to enter any port which was blockaded or where hostilities were in progress; that no voyage was to be undertaken or goods or cargoes loaded which would involve risk of seizure, capture, or penalty by British or foreign rulers, and no acids or cargoes injurious to the steamer were to be shipped; that the charterers were to have the option of sub-letting the steamer to the Admiralty or other service without prejudice to the charterparty, but the charterers to remain responsible. The owners were to provide and pay the crew and for stores and maintenance. Any dispute arising during the execution of the charterparty was to be settled by arbitration.

It is, of course, obvious that, although the contract was described as one of lease, there was and could have been no lease properly so called. The real relation was that the owners retained through

the officers and crew the possession of the vessel, and that the charterers were entitled to use it for certain purposes and under certain restrictions during a term of five years.

There was another important clause in the charterparty to which I have to refer. This was the usual one providing that certain perils should be excepted. These perils included "arrests and restraints of princes, rulers and peoples." The effect of the clause was that if and to the extent to which the perils mentioned interfered with the fulfilment of their obligations the parties were exempted from liability for non-performance.

Early in December, 1914, the steamer was requisitioned by the British Government for Admiralty transport service and was engaged in such service until about February 10, 1915. No question has been raised as to this requisition, which appears to have been accepted by both parties as a merely temporary burden upon their rights under the charterparty. But about the latter date notice was given by the Admiralty Director of Transports to the charterers that the steamer was again requisitioned and that she would be specially fitted by the Government for the service on which she was to be employed. This was done shortly thereafter, and the Government made structural alterations and used her for the transport of troops. She has since then, according to what was stated at the Bar, been in part at all events restored to something resembling her original condition, and has been used for the carriage of oil. But I think it is clear that the Admiralty neither regarded their powers as in any way restricted, nor had any intention of limiting the period during which they claimed to use the steamer. Had the charterers done what the Government has done, their action would have constituted such a breach of contract as would have entitled the owners to treat the contract as at an end.

Under these circumstances a dispute arose between the owners and the charterers as to their rights, and this dispute was, under the arbitration clause, referred to Mr. Leck, one of His Majesty's counsel. The owners claimed that what had happened could not be treated as a sub-letting under the contract, but that the basis of the contract was gone, inasmuch as the steamer could no longer be made available under the charterparty, which was therefore either entirely at an end or was indefinitely suspended under the restraint of

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princes clause. The charterers argued that in reality there had been what was tantamount to a sub-letting to the Admiralty, and that the uses by the latter for purposes outside those prescribed by the charterparty, and the making of the structural alterations, did not amount to breaches of contract by the charterers, inasmuch as they were covered by the restraint of princes clause. If the charterers were right, it would no doubt follow that they would be entitled to retain the largely increased monthly payment which Government has been making for the use of the steamer, paying to the owners only the monthly sum stipulated for by the charterparty. If the owners, on the other hand, were right, the charterers would be able to claim compensation from the Government for loss of rights under the terms of a general proclamation issued by the latter, but the owners would be the persons entitled to the hire paid by the Admiralty for the steamer to the use of which the charterers would no longer be entitled. The question of compensation was not, however, raised before the arbitrator, and it is not before us. The only point referred was whether the charterparty was brought to an end or at all events fully suspended by the second requisition and what was done under it.

The arbitrator decided this question in the affirmative, but stated a special case. On the argument of this special case Atkin J. and the Court of Appeal differed from him, and gave judgments to the effect that the contract remained in existence, and that the restraint of princes clause kept the contract alive while precluding the owners from insisting that the diversion of use and alteration of structure were breaches for which the charterers could be held responsible.

My Lords, it may well be that, at all events where there is such a clause, in the case of a time charter with a substantial period yet to run, an event might occur which, while it temporarily interfered with its performance, would not destroy its existence. On the other hand, in the case of a charter for a single voyage, the same event might be sufficient to destroy the very basis in the case of a voyage charter when it would not have been sufficient to destroy that of a time charter. The question in each case is one of the application of the general principles to which I referred earlier to the facts and circumstances of the particular case. And I think that similar considerations must govern the question whether what has happened

in the present case can be regarded as falling within the meaning of the restraint of princes clause. That clause may apply to mere structural alterations made by a Government. It is a more difficult question whether it can cover a taking possession which may, so far as appears, outlast the period of the charter. In one aspect the act of the Government may come within the clause, but in another and equally important aspect it may mean so much more that by destroying the possibility of performing the contract as a whole it destroys the applicability of the clause.

In the case before us I am accordingly of opinion that if the conclusion is once reached that the requisition was of such a character that it would otherwise supersede or indefinitely suspend the contract the special clause cannot assist the charterers. Now it is no doubt true that the charter was to remain in force until December 4, 1917. But the requisition by the Admiralty was one which enabled it to use the steamer for purposes altogether outside the contract, and that for a time to which no limit could be assigned. The time might extend until after the period of the charterparty had run out. It is impossible for any Court to speculate as to the duration of the war, on which the Admiralty requirements may depend. It is enough that events which are of public notoriety indicate the duration as one about which there is no apparent certainty of which a Court of justice can take cognizance. The question whether the contract was brought to an end must be judged in the light of events as they were in February, 1915. The requisition was of a character so sweeping that I think the burden of showing that the purposes of the charter could continue to subsist concurrently with its operation rested on those who maintained the affirmative. Prima facie the entire basis of the contract, so far as concerned either performance in February, 1915, or performance at any calculable period in the future, seems to me to have been swept away. It might thereafter have proved possible to make a fresh start within what turned out to remain over of the time of the charter. But it equally might not. I am therefore unable to see how the contract can be properly looked on as only temporarily interrupted. Such interruption has a meaning if the restraint of princes clause covers the interrupting event. The clause is introduced for the very purpose of saving the foundation of the contract. But if that

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foundation is gone the contract is gone and the clause with it. Now the basis of the contract here was that the owners should provide a steamer to be used by the charterers for certain purposes only. The use of the ship and the fulfilment of the purposes are swept away by vis major for a period to which no limit can be assigned. It is possible that under different circumstances, and with a period as to which there was an obvious inference of fact that it would in all probability outlast the duration of the war, the vis major might have been regarded as a mere temporary interruption which the special clause covered. But it seems to me that the charterers cannot bring their case up to the point at which it is legitimate to draw such an inference. I am therefore driven to the conclusion that there was here no mere temporary suspension of a subordinate obligation of the charterers. I think that the entire contract was avoided, and with it the clause providing for restraint of princes, and that the appellants were consequently entitled to judgment.

Lord Atkinson. (1) My Lords, this case came before Atkin J. upon an award in the form of a special case stated by an arbitrator, and the question for the Court to determine was stated to be whether, on the facts stated in the case, the arbitrator was right in holding that the charterparty dated May 18, 1912, came to an end when the steamer (i.e., the tank steamer *F. A. Tamplin*) was requisitioned by the British Government on February 15, 1915.

Your Lordships were informed that this is a test case, and that the parties on both sides desired that the House should not confine its attention to the facts found by the arbitrator, but should consider, in addition, all relevant matters which have taken place since the hearing before him, with a view of determining whether or not this charter has come to an end.

By the charterparty the British tank steamer *F. A. Tamplin*, in process of being built at the date of the document, was chartered to the respondents for a period of sixty calendar months, commencing from December 4, 1912, and expiring on December 4, 1917, at the hire of 1750*l.* per calendar month for the first twelve months, and 1700*l.* per month for the remaining forty-eight months. Under the terms of the charterparty the steamer, described as a tank

(1) Read by Lord Sumner.

steamer, was to be placed at the disposal of the charterers at Newcastle-on-Tyne, in a dock or place in which she could safely lie afloat, as the charterers should direct immediately on being ready, she being then tight, staunch, and strong, fully equipped with a full complement of officers, seamen, engineers, and firemen necessary for that service. Now the service for which she was rendered fit and for which she was delivered was this : For voyages between any safe port or ports in the United Kingdom, the Continent of Europe, or the seven other countries named, and back finally to a coal port in the United Kingdom, for the carriage of refined petroleum or crude oil or its products. It is quite true that the charterers are not, according to the letter of this clause, bound to employ the vessel on the particular service named, but they are bound not to employ her on any other service. They might possibly retain her in dock during the entire period of five years, or any part of it, at a cost of 1750*l.* or 1700*l.* per month. But if the parties were not business people, as they are, but merely rational beings, they could not when they entered into the charterparty have contemplated anything of this kind. Whether that be so or not, the contract had secured to the charterers the power to determine whether or not the vessel should be employed in the trade authorized on such voyages as they might select between the ports named ; and one of the assumptions upon which I think the contract must have been based was that the charterers should remain free to exercise, as and when they deemed fit, the powers secured to them by their contract. Else why enter into it at all ? The same remark applies to the owner. The parties have, no doubt, in one article—article 20, with which I shall presently deal—specified several instances in which the will and intentions of each of them might be overborne by force majeure, but if one looks through the conditions upon which the contract was made it will plainly appear that neither party could perform his side of the contract unless he be left a free agent. For instance, the first condition requires that the owners shall provide all provisions and wages for the crew and maintain the ship in a thoroughly efficient state in hull, machinery, and equipment for and during the service. Article 6 requires that the crew, the servants of the owners for whom they are responsible, shall do certain work in a particular manner in the process of loading the ship.

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By article 2 the charterers are bound to provide and pay for oil fuel, galley coals, port charges, pilotage, &c. By article 3 the hire is to continue for the time specified for termination of the charter and until the redelivery to the owners (unless lost) at a coal port in the United Kingdom, as provided. By article 13 the captain, although appointed by the owners, is put under the order and direction of the charterers as regards employment, agency, or other arrangements. By article 12 the captain is bound to prosecute his voyages with the utmost dispatch, and to render all customary assistance with the ship's crew, winches and boats, and to proceed to sea when ordered, if tide and weather permit. If the charterers have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners, on receiving particulars of the complaint, should investigate the same and, if necessary, make a change in the appointment. By article 15 it is provided that the master shall be furnished from time to time with all requisite instructions and sailing directions and shall keep a full and correct log of the voyage or voyages, which shall be submitted to the charterers or their agents when required.

Thus by these several articles, and many others which might be referred to, powers are conferred and obligations imposed upon each of the contracting parties; and active duties are required to be performed by each. None of these things can be done unless the charterers retain possession and control of the ship, and both parties retain their freedom of action. It cannot, in my view, be possibly supposed that they by this charter, apart from article 20, ever intended to enter into an absolute contract to perform the impossible —that is, to exercise these powers, fulfil these obligations, and discharge these duties after the ship, in and upon which all these things were to be done, had been taken possession of by a third party who had lawfully removed her from the control of both of them for a considerable portion of the period of hiring, and might continue so to do for the entire of that period.

Now I turn to article 20. It is immediately preceded by article 19, which provides that "if the vessel be lost the hire is to cease." But why? Surely because the charterers would thereby lose, possibly through one of the excepted perils such as the act of God or perils of the sea, the thing they had contracted to pay for, namely, the

use of the ship. Yet according to the contention of the respondents the hire is not to cease, though they should lose for the entire period of hiring the use of the ship by another of the excepted perils, the restraint of princes.

Article 20 then provides that "the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers, and peoples, collisions, stranding and other accidents of navigation always excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowner." I think it plain that this clause was introduced mainly for the protection of the shipowner. Either party could, however, rely upon it as a defence to an action brought upon the charterparty to recover damages for a breach of contract, consisting in the omission to do an act that party was bound to do, if he was prevented from doing it by one of the excepted perils. This, however, is not all. If the act omitted to be done was the performance or non-fulfilment of a condition precedent, then, in addition, the contract might come to an end and both parties be released from all obligations under it. The fallacy underlying the respondents' contention appears to me to be this, that such a contract can never be put an end to through the operation of one of the excepted perils. The following authorities show, I think, that is not the law.

Two well-known cases, many times approved of and followed, establish, in my view, this proposition—first, *Geipel* v. *Smith* (1), and, second, *Jackson* v. *Union Marine Insurance Co.* (2), decided in the Exchequer Chamber on appeal from the Court of Common Pleas. (3) In the first of these two cases the charterparty contained a clause somewhat similar to this 20th article, excepting the act of God, Queen's enemies, restraint of princes, rulers, &c. Yet the owners were relieved from their contract to take on board a cargo and carry it to Hamburg, since the port of Hamburg was blockaded by the French fleet; that blockade clearly being a restraint of princes and peoples. Blackburn J. said (4): "The defendants, therefore, the shipowners, could not fulfil their contract by delivering the cargo, without running the blockade. I am unable to see why

(1) L. R. 7 Q. B. 404.
(2) L. R. 10 C. P. 125.
(3) (1873) L. R. 8 C. P. 572.
(4) L. R. 7 Q. B. 412.

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this was not a restraint of princes ; it was clearly a restraint by the then Emperor of France preventing the cargo from being carried on to Hamburg. But then comes another question : conceding that whilst the blockade existed there was 'a restraint,' an obstacle to the fulfilment by the defendants of their obligation under the charter-party, it is said that the moment the blockade was raised the ship might have gone off, and therefore she ought to have been ready with her cargo on board to start at any moment. But I cannot agree that however long the blockade existed, which might be during all the time the war lasted, and therefore might have been for years, the ship and cargo must be kept ready to sail as soon as wind and weather permitted after the blockade was raised. It would be most inconvenient to give such a construction to the contract, and would be to frustrate the very object of such a contract, viz., the speedy transport of the shipper's goods, and the remunerative employment of the shipowner's vessel." And Lush J. said (1): "I think the fifth plea may also be treated as valid. It alleges the breaking-out of a war between France and Germany, and a blockade of the port of Hamburg. If the impediment had been in its nature temporary I should have thought the plea bad ; but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this." In the second of the cases the action was brought on a policy of insurance effected by the plaintiff on chartered freight valued at 2900*l.*, to be earned by the plaintiff's vessel, the *Spirit of Dawn*, on a voyage at and from Liverpool to Newport, in tow, and thence to San Francisco. By the charter, dated November 22, 1871, entered into between the plaintiff and Messrs. Rathbone & Co., this ship was to proceed with all convenient speed from Liverpool to Newport (dangers and accidents of navigation excepted) and there load a cargo of iron rails for San Francisco. The ship, in performance of her obligation under the charterparty, started on the first stage of her voyage, i.e., from Liverpool to Newport, but en route took the rocks in Carnarvon Bay, and was got off, after considerable delay, much damaged. It is an error to suppose that at the time of accident the owner's contract was in the position of a merely executory contract. It was, in truth, part

(1) L. R. 7 Q. B. 414.

performed. The rails were required for the construction of a railway in San Francisco. Time was a matter of importance to the charterers. They accordingly immediately threw up the charter and chartered another ship. The defendants, relying on the clause excepting "dangers and accidents of navigation," denied in their defence that there was any loss by a peril *insured against*. The case was tried before Brett J. The jury answered in the affirmative three questions left to them: "First, whether there was a constructive total loss of the ship"; second, "whether the time necessary for getting the ship off the rocks and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time"; and third, "whether such time was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers." The learned judge, being of opinion that there was no evidence of a constructive total loss of the ship, and no evidence of a loss of freight by the perils insured against, directed a verdict to be entered for the defendants, reserving leave to the plaintiff to move to enter a verdict for him. A rule nisi having been obtained by the plaintiff to enter a verdict for him, on cause being shown, it was held by Keating and Brett JJ. that the charterers were absolved from loading the vessel, and that the shipowner therefore might recover for the loss of the freight. Bovill C.J., on the contrary, held that the charterers were not entitled to throw up the charter, and that consequently the plaintiff was not entitled to recover against the underwriters, and that the findings of the jury were immaterial. The decision of the majority was affirmed in the Exchequer Chamber by Bramwell B., Blackburn, Mellor, and Lush JJ., and Amphlett B.; Cleasby B. dissenting. It is therefore a case of high authority. The judgment of the majority was delivered by Bramwell B. That distinguished judge points out (1) that as no date was fixed for the arrival of the ship at Newport, it should be held that there was an implied condition in the charterparty that she should arrive within a reasonable time. He then proceeds: "Now what is the effect of the exception of perils of the seas, and of delay being caused thereby? Suppose it were not there, and not implied, the shipowner would be subject to

(1) L. R. 10 C. P. 144.

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an action for the ship not arriving in a reasonable time, and the charterers would be discharged. Mr. Benjamin says the exception would be implied. How that is, it is not necessary to discuss, as the words are there: but, if it is so, it is remarkable as shewing what must be implied from the necessity of the case. The words are there. What is their effect? I think this: they excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say *he* is, I think *both* are. The condition precedent has not been performed, by the default of neither. It is as though the charter were conditional on peace being made between countries A. and B., and it was not; or as though the charterer agreed to load a cargo of coals, strike of pitmen excepted. If a strike of probably long duration began, he would be excused from putting the coals on board, and would have no right to call on the shipowner to wait till the strike was over. The shipowner would be excused from keeping his ship waiting, and have no right to call on the charterer to load at a future time. This seems in accordance with general principles. The exception is an excuse for him who is to do the act, and operates to save him from an action and make his non-performance not a breach of contract, but does not take away the right the other party would have had, if the non-performance had been a breach of contract, to retire from the engagement: and if one party may, so may the other." If, therefore, it be an implied condition precedent of the contract in the present case that both the parties to it should not without any default on their respective parts be, by the operation of a force majeure, such as the restraint of princes, deprived for the whole or a substantial portion of this period of five years of all power to exercise the rights or discharge the obligations conferred and imposed by it, the action of the Admiralty destroyed the basis upon which the contract was, in the contemplation of the parties, based, and in this sense rendered the fulfilment of the condition precedent impossible. See judgment of Blackburn J. in *Taylor* v. *Caldwell*. (1) Article 20 saves each of the parties from a claim for damages for breach of contract at the suit of the other, but it does not deprive either of them of the right to free himself or themselves from the contract on the ground that the basis upon which it rested has been destroyed.

(1) 3 B. & S. 826, 833.

It is only necessary, I think, to cite one authority in addition to those cited in *Horlock* v. *Beal.* (1) It is *Poussard* v. *Spiers & Pond.* (2) There the plaintiff agreed in writing with the defendants to sing and play in the chief female part in a new opera about to be brought out at the defendants' theatre at a weekly salary of 11*l.* for three months commencing about November 14, provided the opera should so long run. The first performance of the piece was not announced till November 28, but no complaint was made as to this delay. It was an implied, though not an express, term of the contract that Madame Poussard should attend rehearsals. Owing to delays on the part of the composer, the music was not in the hands of the defendants till a few days before November 28. The later and final rehearsals did not take place till the week ending this November 28. Madame Poussard, though she attended some of the rehearsals, unfortunately was ill on November 23 and had to leave the rehearsal. On December 4, having recovered, she offered to take her place in the opera, but was refused, another artist having, in the meantime, been engaged to fill the part. The judgment of the Court of Queen's Bench was delivered by Blackburn J. He said (3): "My brother Field, at the trial, expressed his opinion that the failure of Madame Poussard to be ready to perform, under the circumstances, went so much to the root of the consideration as to discharge the defendants, and that he should therefore enter judgment for the defendants"; but he left five questions to the jury. They found that the non-attendance of Madame Poussard on the night of the opening was not of such material consequence to the defendants as to entitle them to rescind the contract; but in answer to another question they found that it was of such consequence as to render it reasonable for the defendants to employ another artist, and that the engagement of this other artist was reasonable. Blackburn J. held that this finding enabled the Court to decide, as a matter of law, that the defendants were discharged. He said (4): "The analogy is complete between this case and that of a charterparty in the ordinary terms, where the ship is to proceed in ballast (the act of God, &c., excepted) to a port and there load a cargo. If the delay is occasioned by excepted perils,

(1) [1916] 1 A. C. 486.
(2) (1876) 1 Q. B. D. 410.
(3) 1 Q. B. D. 413.
(4) Ibid. 414.

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the shipowner is excused. But if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo : see per Bramwell B., delivering the judgment of the majority of the Court of Exchequer Chamber in *Jackson* v. *Union Marine Insurance Co.* (1) And we think that the question, whether the failure of a skilled and capable artiste to perform in a new piece through serious illness is so important as to go to the root of the consideration, must to some extent depend on the evidence ; and is a mixed question of law and fact." The case of *Horlock* v. *Beal* (2) decided that these principles apply to the contract of a sailor to serve on a very lengthened voyage or series of voyages, the duration of which was not to extend beyond a period of two years. The detention of a ship by a hostile Power, which might last for more than two years, was held to terminate, before that period had arrived, the contract of the owners to pay the sailor wages.

I am quite unable to agree with the contention urged by the respondents that the principle of these decisions can never apply to a time charter. It is by no means true that a time charter must necessarily be of longer duration than a charter for a single voyage or a round voyage to many different ports. That depends upon the length of the term for which the ship is chartered. It may well be that the " impediment," to use the words of Lush J. in *Geipel* v. *Smith* (3), should be of longer duration in the case of a time charter than in that of a charter for a single voyage, in order to be treated as " defeating and destroying " the object of the commercial adventure of the charterer and shipowner. For instance, I think it would be impossible to contend that this adventure would not be " destroyed and defeated " if the restraint was, to the knowledge of both parties, expressly imposed by the prince or Government for the entire length of the period of hiring, or for that portion of it which remained unexpired when the restraint was imposed. I do not think it can make any substantial difference if possession should be taken for a substantial portion of the whole, or of the unexpired portion of that period, coupled, as in this case, with a probability or possibility that it may continue till the end of the period. In any of these events the charterer would not get anything like the thing

(1) L. R. 10 C. P. 125, 141. (2) [1916] 1 A. C. 486.
(3) L. R. 7 Q. B. 404.

he contracted for, namely, the use of the ship for the stipulated period, but something wholly different. He could hardly be obliged, while deprived of the use of the ship, to pay her hire. That would be monstrously unjust. This is not like a grant or demise of land, where the right of property passes though the possession should be withheld. In truth the imposition of the restraint for a lengthened period creates a condition of things to which the charterparty is inapplicable. I can find no authority for the proposition that such a contract as the present sinks into abeyance while the restraint is imposed and the possession of the ship is withheld, and springs into active existence again when the restraint terminates, regulating the rights of the parties for the residue of the period of hiring. If the restraint be prolonged for a substantial portion of that period it goes, I think, to the root of the consideration as it did in the cases of *Jackson* v. *Union Marine Insurance Co.* (1) and *Poussard* v. *Spiers & Pond* (2) and relieves both parties to the contract from their engagements. And this though the contract be not in the merely executory stage, but be part performed, as it was in both these cases. Now, turning to the facts of this case, one finds that early in December, 1914, the steamship *F. A. Tamplin* was requisitioned by the British Government for the Admiralty transport service, and was retained in that service until February 10, 1915. No question was raised before the arbitrator as to this requisition. At its date over two years of the period of hiring had elapsed. On this February 10 about two years and nine months of that period remained unexpired. The ship was again requisitioned by the Government, and immediately after that date alterations were made in her to fit her for the transport of troops. She has been since retained in the service of the Admiralty, and it is said she has been restored to her former condition as a tank steamer. She may be retained in the same service while the present war lasts, and even after it has terminated. Nobody can possibly tell how long it will last. At the present moment about one year and eight months of the five years remain unexpired. Up to the present time the charterers have only had, during the two years from December, 1912, till December, 1914, what they contracted for and what they were only bound to pay for. They may never get any

(1) L. R. 10 C. P. 125. (2) 1 Q. B. D. 410.

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further use of her. The owners cannot deliver the ship into their possession and control and may not for years be in a position to do so. Neither of the parties are in default. In the month of March, 1915, the owners refused to be longer bound by the charterparty. In my view there is here involved such a substantial invasion of that freedom of both parties to exercise the rights and discharge the obligations secured to and imposed upon them by the charterparty, the continued existence of which must, I think, have necessarily been in their contemplation as to the foundation of their contract when they entered into it, that, in the events which have happened, each of them is now entitled to treat it as at an end.

I have dealt with the case altogether apart from the question of the amount which the charterers have received as compensation for the use of the ship. The charterers have been treated by the Crown as if they had sub-let the ship to the Admiralty. They have not, in fact, done so. What they have received they have got from the bounty of the Crown. They have no legal right to it. The receipt of it is, therefore, in my view, quite irrelevant. To consider it only obscures the legal point for decision. When the legal rights of the parties have been determined the Crown will, no doubt, endeavour to do justice to the parties according to those rights. Judging from what has happened up to the hearing of this appeal, I am of opinion that the charterparty is now at an end and that the parties to it are released from all obligations under it. The appeal, under these circumstances, I think succeeds.

Lord Parker of Waddington. My Lords, in considering the question arising on this appeal, it is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible, or otherwise frustrates the objects which the parties to the contract have in view. This principle is one of contract law, depending on some term or condition to be implied in the contract itself and not on something entirely dehors the contract which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, there-

fore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency.

Again, in determining whether any such term or condition can be properly implied, the nature of the contract is of considerable materiality. If, for example, the contract be for the hire of a particular horse on a particular day, it would be easy to imply a condition that the horse should still be living on the day in question. If, however, the contract were for the hire of a horse generally, it would be difficult, if not impossible, to imply a term relieving the hirer from liability, if his only horse died before the day arrived.

Moreover, some conditions can be more readily implied than others. Speaking generally, it seems to me easier to imply a condition precedent defeating a contract before its execution has commenced than a condition subsequent defeating the contract when it is part performed. A contract under which A. is to have the use of B.'s horse for two days' hunting might well be defeated by the death of the horse before the two days commenced. It would be easy to imply a condition precedent to that effect. But the case would be very different if the horse died at the end of the first day, and it was sought to imply a condition subsequent relieving A. in that event of liability to pay the sum agreed for the hire.

The simplest cases of the application of the principle are, no doubt, those of contracts de certo corpore, as in *Taylor* v. *Caldwell.* (1) Here there was an agreement by A. to allow B. the use of his music-hall on certain specified days, and the music-hall was burnt down before the first of those days arrived. A condition precedent could easily be implied. A similar case is that of *Appleby* v. *Myers.* (2) Here A. contracted to erect machinery in buildings belonging to B., and the buildings were burnt down before the work was finished. It was not difficult to imply a condition subsequent.

But the principle applies also to cases where the existence or continued existence of some specific thing is in no way involved, and in such cases its application is not so easy. It applies, for instance, to contracts of service which, from some causes not contemplated by the contract itself, have become impossible of fulfilment. A good

(1) 3 B. & S. 826. (2) L. R. 2 C. P. 651.

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instance of this may be found in the recent decision of your Lordships' House in *Horlock* v. *Beal*. (1) It applies also to charterparties where some commercial adventure contemplated by the parties, and in the fulfilment of which both are interested, is brought to an end by the happening of some event for which neither is to blame. The leading case on this branch of the law is *Jackson* v. *Union Marine Insurance Co.* (2) Here the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load and carry to San Francisco a cargo of iron rails. The ship left Liverpool on January 2, and on January 3 ran aground in Carnarvon Bay, sustaining considerable damage. It would necessarily be many months before she could be got off and put in such repair as to be able to continue her voyage. In the commercial sense, therefore, the voyage contemplated in the charterparty had been brought to an end, and under these circumstances the contract was held to have determined. The voyage, if resumed when the ship had been got off and repaired, would have been a different voyage, "as different," to use Bramwell B.'s words, "as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage." The season within which the adventure was to be carried out was, in fact, of importance to both parties to the bargain, and it was thus easy to imply a condition that if the voyage became impossible of completion within that season the contract should be at an end. The exception as to dangers of the sea and accidents of navigation no doubt showed that the parties were contemplating and providing for the case of some delay arising from these causes, but they were evidently not contemplating a delay so great that the spring voyage would become altogether impossible. The particular adventure being a voyage to be carried out within reasonable limits of time furnished a definite standard by which it could be determined whether the delay which actually occurred was or was not within the exception clause. There was, therefore, no inconsistency between the implied condition and the express provisions of the contract.

My Lords, there is, so far as I can find, no case in which this principle has been applied to time charterparties as distinguished

(1) [1916] 1 A. C. 486. (2) L. R. 10 C. P. 125, 141.

from charterparties which contemplate particular voyages. It was suggested in argument that *Tully* v. *Howling* (1) was such a case. There the charterparty was a time charterparty for twelve months from the completion of the voyage on which the vessel was then engaged. After the completion of this voyage, and when the charterer was ready to load, the vessel was detained by the Board of Trade as unseaworthy. It took two months to make the vessel seaworthy, and meanwhile the charterer had repudiated the contract. It was held that he was justified in so doing on the ground that time was of the essence. There had been, in fact, a breach of the contract by the owners so material as to give the charterer a right to rescind. Only Brett J. put the case as one of the frustration of a commercial adventure. Without laying it down that the principle can in no circumstances be applicable to time charterparties, I am of opinion that its application is in such cases much more difficult than in the case of charterparties which contemplate a definite voyage within certain limits of time. I concur in this respect with what is said by Bailhache J. in *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* (2) My reasons will appear when I come to consider the terms of the charterparty in the present case.

My Lords, the contract in the present case is contained in the charterparty of May 18, 1912, whereby the owners of the steamship *F. A. Tamplin* agreed to provide her with a full complement of officers, seamen, engineers, and firemen, and hold her at the disposition of the charterers for the voyages and other purposes therein mentioned for a period of sixty calendar months from December 4, 1912, subject, nevertheless, to the conditions therein specified. The charterers were to pay the owners monthly in advance for the first twelve calendar months 1750*l.*, and thereafter 1700*l.* per month by way of freight. By the 17th condition the freight was suspended in the event of loss of time, by reason of deficiency in men or stores, or any defect or breakdown of machinery or damage or accident preventing the working of the vessel for more than twenty-four consecutive hours. By the 19th condition the payment of freight was to cease altogether in the event of the vessel being lost. By the 20th condition the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, and thieves, arrests or restraints

(1) 2 Q. B. D. 182. (2) [1916] 1 K. B. 429, 437-8.

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of princes, rulers, or peoples, and stranding and other accidents of navigation were excepted even when occasioned by negligence, default, or error of the pilot, master, mariners, or other servants of the owners.

As I read this contract, the parties are not contemplating the prosecution of any commercial adventure in which both are interested. They are not contemplating the performance of any definite adventure at all. The owners are not concerned in the charterers doing any specific thing beyond the payment of freight as it becomes due. They are only concerned that the charterers shall pay the freight and shall not use the ship contrary to the provisions of the charterparty. It would be to the interest of the owners that the charterers should not make any use of the ship at all. They would thus save the cost of repairs due to wear and tear. On the other hand, the charterers only stipulate that the vessel shall be at their disposal for certain defined purposes. If they so desire, they retain full liberty not to use the vessel for any purpose whatever. Further, the contract contemplates that, though the charterers desire to use the vessel, it may for intermittent periods of indefinite duration be impossible for them so to do. In such cases there are express provisions differing according to the particular circumstances from which such impossibility arises. In cases within condition 17 there is a suspension of freight only. In cases within condition 20, and not within condition 17, the payment of freight continues, and the owners incur no liability. Thus, if the ship cannot put to sea because of deficiency of seamen, freight will be suspended. If, however, the vessel cannot put to sea because of an embargo, the freight continues to be payable, nor are the owners liable in damages. It makes no difference at what period during the term of the charter the deficiency of seamen or embargo occurs. Whether it occurs within the first or last six months of the term the result is to be the same.

My Lords, I entertain no doubt that the requisitioning of the steamship by His Majesty's Government in the present case is a "restraint of princes" within the 20th condition. The parties therefore have expressly contracted that for the period during which by reason of such restraint the owners are unable to keep the ship at the disposition of the charterers the freight is to continue

payable, and the owners are to be free from liability. This period may be long or short. It may be certain or indefinite. It may occur towards the beginning or towards the end of the term of the charterparty. The result is to be the same, unless indeed the circumstances are such that the ship can be said to be lost within the meaning of condition 19. Moreover (and this seems to me the vital point), the charterparty does not contemplate any definite adventure or object to be performed or carried out within reasonable limits of time so as to justify a distinction being drawn between delays which may render such adventure or object impossible and delays which may not.

Under these circumstances it appears to me to be difficult, if not impossible, to frame any condition by virtue of which the contract of the parties is at an end without contradicting the express provisions of the contract and defeating the intention of the parties as disclosed by those provisions. The nearest I can get is a proviso to the 20th condition conceived as follows: "Provided that if the period during which the ship cannot be held at the disposition of the charterers by reason of any of the matters referred to in this condition, though indefinite, be such as will in all reasonable probability extend beyond the term of the charterparty, the contract between the parties shall be determined." But, in my opinion, even this would contradict the express terms of the contract. It could, for example, except from its provisions cases in which the ship ran aground so near the end of the term of the charterparty that it would be impossible to get her off or ready to put to sea once more within such term. This would, in my opinion, be contrary to the provisions of condition 20. Further, even if it were permissible to imply such a proviso to the 20th condition, there is, in my opinion, no reason for holding that the Government will, in all reasonable probability, retain the vessel for the remainder of the term of the charterparty. Whether they will do so or not seems to me to depend on all sorts of circumstances as to which a Court of justice cannot speculate. They may do so or they may not. I do not think that one event is more likely than the other.

My Lords, having regard to the difficulty of framing any condition which can be implied without contradicting the express terms of the contract, having regard to the nature of the contract, which is a

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time charter only and does not contemplate any commercial adventure in which both parties are interested, or indeed any definite commercial adventure at all, and finally, having regard to the fact that the condition which is sought to be implied is a condition defeating a contract already part performed and not a condition precedent to a contract which remains purely executory, I have come to the conclusion that the decision of the Court of Appeal was right and ought not to be disturbed.

My Lords, I desire to add this. I cannot help thinking that the question really at issue has been somewhat obscured by the fact that the Government has under the terms of the Royal Proclamation of August 3, 1914, to pay compensation to "the owners," to be settled in case of difference by arbitration. Owners must in this Proclamation include all parties interested. It cannot in the present case mean the owners exclusive of the charterers or the charterers exclusive of the owners. Both are entitled to compensation, and if such compensation be not agreed with either separately, but with both together, the amount so agreed will be divisible between them according to their respective rights and interests. The case was argued before your Lordships on the footing that it would determine which of two possible claimants was to be held entitled to all which might be payable by the Government by way of compensation under the Proclamation. I entirely dissent from this view.

The appeal should, in my opinion, be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 24, 1916.

Solicitors for appellants: *Holman, Birdwood & Co.*
Solicitors for respondents: *Thomas Cooper & Co.*

[HOUSE OF LORDS.]

ASSOCIATED NEWSPAPERS, LIMITED, AND OTHERS . . . . . } APPELLANTS;

AND

CORPORATION OF THE CITY OF LONDON . RESPONDENTS.

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Rates—Exemption from Taxes and Assessments—City of London—General Rate—Consolidated Rate—Police Rate—Exclusion of Exemption—7 Geo. 3, c. 37, s. 51—City of London Sewers Act, 1848 (11 & 12 *Vict. c. clxiii.*), *s.* 169.

Sect. 51 of 7 Geo. 3, c. 37, vests the land reclaimed from the river Thames under the provisions of that Act in the owners of the adjoining lands and wharves "free from all taxes and assessments whatsoever."

The City of London Sewers Act, 1848, which provided for the levying of the sewer rate and the consolidated rate, enacts by s. 169 that every such rate shall be made upon every occupier of any house or building in the City "whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place, or otherwise."

The occupiers of certain hereditaments situate in the city of London and forming part of the area reclaimed from the river Thames under 7 Geo. 3, c. 37, were rated to so much of the general rate levied under the City of London (Union of Parishes) Act, 1907, as represented the consolidated rate and the police rate, which was imposed by the City of London Police Act, 1839:—

Held—(1.) (by Viscount Haldane, Lord Parmoor, and Lord Wrenbury; Lord Sumner dissenting), that the exemption granted by 7 Geo. 3, c. 37, though limited by the context to local as distinguished from Imperial taxes, extended to all local taxes and assessments, whether present or future, except so far as any Act imposing a new tax qualified or repealed the exemption; (2.) (by all their Lordships), on the authority of *London Corporation* v. *Netherlands Steamboat Co.* [1906] A. C. 263, that s. 169 of the City of London Sewers Act, 1848, did not impliedly repeal the exemption so far as the consolidated rate was concerned.

Held, therefore (Lord Sumner dissenting), that the occupiers of the reclaimed lands were exempt from liability to the rates in question.

Sion College v. *London Corporation* [1901] 1 K. B. 617, in so far as it decided that the exemption granted by 7 Geo. 3, c. 37, applied

* *Present*: VISCOUNT HALDANE, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

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only to taxes and assessments in existence at the date of the Act, and others substituted for them, overruled.

Williams v. *Pritchard* (1790) 4 T. R. 2, *Perchard* v. *Heywood* (1800) 8 T. R. 468, and *Rex* v. *London Gas Light and Coke Co.* (1828) 8 B. & C. 54 explained.

Dictum of Bayley J. in *Rex* v. *London Gas Light and Coke Co.*, 8 B. & C. 54, 62, overruled.

Decision of the Court of Appeal [1915] 3 K. B. 128 reversed.

APPEAL from a decision of the Court of Appeal (1) varying a decision of a Divisional Court. (2)

The appellants were the owners and occupiers of certain hereditaments situate in the city of London and forming part of an area of land reclaimed from the river Thames under the provisions of 7 Geo. 3, c. 37. The reclamation was carried out as to part by and at the expense of the Common Council of the city of London and as to the remainder by and at the expense of the owners and proprietors of the several wharves and grounds then abutting on the river Thames and adjoining the area in question, and by s. 51 of the Act the whole of the land in the area so reclaimed was vested in the owners and proprietors of the said wharves and grounds according to their respective interests "free from all taxes and assessments whatsoever." The appellants were the successors of such owners and proprietors.

On April 6, 1911, the respondents made a general rate of 9½*d.* in the pound, and the appellants were rated thereto in the manner hereinafter stated. The appellants gave a joint notice of appeal against the rate to the General Quarter Sessions of the Peace for the city of London, and by consent of all parties and by an order of Lush J. a special case was stated for the opinion of the King's Bench Division pursuant to s. 11 of the Quarter Sessions Act, 1849.

The rate was made under the provisions of s. 15 of the City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), which provided for the levy by means of one rate to be termed the general rate of certain rates which were in existence before the passing of the Act of 1907, namely, the sewer rate, the consolidated rate, the police rate, and the trophy tax, together with certain expenses of the Common Council of the City. The items for which

(1) [1915] 3 K. B. 128. (2) [1914] 2 K. B. 822.

it was sought to make the appellants liable amounted to $9\frac{1}{8}d.$ in the pound, and were thus described in the demand note for the rate :—

Expenses of paving, cleansing, lighting, improvements, and sanitary charges other than those of sewerage and drainage, $5\frac{3}{16}d.$

Expenses under the City of London (Central Criminal Court House) Act, 1904, $\frac{6}{16}d.$

Expenses in respect of police, $3\frac{7}{16}d.$

Other expenses of the Common Council not payable out of the poor rate, $\frac{2}{16}d.$

The only substantial items were included either in the consolidated rate or in the police rate.

The two main questions raised by the present appeal were (1.) whether the exemption granted by s. 51 of 7 Geo. 3, c. 37, applied to future charges or was limited to charges in existence at the time of the passing of the Act and subsequent charges in substitution for such pre-existing charges ; (2.) whether in the latter alternative the consolidated rate and the police rate, or either of them, were substantially new charges or represented charges in existence at the time when the Act was passed.

As regards the consolidated rate, prior to the passing of the Act of 1767 provision was made by a series of statutes commencing in 1663 with 14 Car. 2, c. 2, and ending in 1766 with 6 Geo. 3, c. 26, for levying by means of rates the expenses of paving, cleansing, and lighting the streets of the city of London, and by the latter Act these rates were consolidated and made one joint and general fund to be collected together. All these statutes, together with certain statutes passed since 7 Geo. 3, c. 37, so far as the same still remained in force, were repealed by the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.).

By s. 168 of that Act rates were to be levied called "the sewer rate" (with which this appeal is not concerned) and "the consolidated rate" for the purpose of "forming, making, maintaining, keeping in repair, paving, lighting, sweeping, cleansing, and watering the streets within the City, and of making and carrying into effect such improvements within the City" as the commissioners appointed by the Act should from time to time be authorized to make and carry into effect.

By s. 169 every such rate was to be made "upon every person

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who shall inhabit, hold, occupy, possess, or enjoy any house or building within the City, or partly within and partly without the City (whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situated in any precinct or extra-parochial place, or otherwise), according to the full net annual value thereof respectively."

With regard to the police rate, by 10 Geo. 2, c. 22, after reciting that the well ordering and regulating a watch in the night time within the several wards in the city of London was "of very great importance for the preservation of the persons and properties of the inhabitants thereof, and very necessary to prevent fires, murders, burglaries, robberies, and other outrages and disorders," the Common Council were empowered and required in each year to order and appoint what number of watchmen and bedels they should judge necessary and proper to be kept within each of the several wards of the City and the liberties thereof for the ensuing year, and then and there to direct how they ought to be armed, how long they were to watch, what wages and allowances should be given to them for their attendance, and to order and direct what number of constables should attend every night in each ward, and to make all such other orders and regulations as the nature of each particular service should seem to them to require; and for the better raising and levying of moneys for paying the wages of the watchmen and bedels, and other charges incident thereto, the Common Council were authorized and empowered to direct the alderman, deputy, and common councilmen of each ward to make an equal rate and assessment upon every person who should inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement within such ward (regard being had in making the rate to the abilities of and likewise to the rent paid by the several inhabitants and occupiers so to be rated and assessed).

Before the passing of the City of London Police Act, 1839, there were acting in the City:—

(1.) Watchmen for night duty only, who were paid by the ward out of the watch rate levied by the ward.

(2.) 120 policemen, regulated by the aldermen, and paid for out

of the City's own corporate funds, commonly known as the City's cash, and not out of the rates.

(3.) Constables elected at wardmotes. These were chosen from the wards and were not paid. They had to sit up at night in the watch-houses to receive charges from the watchmen.

The City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), repealed so much of 10 Geo. 2, c. 22, as was then still in force and established a police force for both day and night duty, with special powers as set out in the Act, and provision was made for their payment, one-fourth being contributed by the Corporation of the City out of the City's cash, and the other three-fourths being raised by the police rate in question.

The Divisional Court (Channell, Scrutton, and Bailhache JJ.) held, on the authority of *Sion College* v. *London Corporation* (1), that the appellants were liable for the consolidated rate, but they held that the police rate was a rate for purposes existing at the time of the passing of 7 Geo. 3, c. 37, and that the appellants were not liable for that. Both parties appealed.

The Court of Appeal held that both rates fell within the principle of *Sion College* v. *London Corporation* (1) and that the appellants were liable for both. They accordingly dismissed the appellants' appeal and allowed the respondents' appeal.

1916. May 23, 25, 26, 29. *Sir Robert Finlay, K.C.*, and *Macmorran, K.C.* (with them *E. M. Konstam*), for the appellants. In *Sion College* v. *London Corporation* (1) the Court of Appeal decided, first, that the exemption in s. 51 of 7 Geo. 3, c. 37, applied only to taxes and assessments then in existence and others in substitution therefor, and not to substantially new ones coming into existence at a later date; and, secondly, that the consolidated rate was a substantially new tax. It is submitted that the Court was wrong on both points. In the present case the Court of Appeal, reversing the decision of the Divisional Court, has held that the police rate also is a substantially new tax. The appellants contend, first, that the exemption applies to new imposts, unless the Act imposing the new tax provides the contrary; and, secondly, that the consolidated rate and the police rate are old rates. Dealing first with

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the second point: as regards the consolidated rate, the main items of this rate are paving, cleansing, and lighting expenses, and by a long series of enactments passed prior to 7 Geo. 3, c. 37, rates were imposed to provide for these expenses. Finally, by 6 Geo. 3, c. 26, which was passed a year before the Act containing the exemption, and which was in the nature of a consolidation Act, all these rates were consolidated into one. The City of London Sewers Act, 1848, which first imposed the consolidated rate in its present form, followed the provisions of the earlier statutes, and this rate was really in existence as a rate prior to the passing of 7 Geo. 3, c. 37. In *Sion College* v. *London Corporation* (1) the Court of Appeal was obviously influenced by the fact that at that time the consolidated rate included the education rate, which is no longer the case, but, apart from that item, it was substantially an old rate, and it has recently been held by this House in regard to the poor rate that a rate does not lose its identity because some additional burdens have been placed upon it: *London Corporation* v. *Associated Newspapers*. (2) Then it may be said that s. 169 of the City of London Sewers Act, 1848, operates as a repeal of the exemption, so far as the consolidated rate is concerned. It is difficult to give any satisfactory construction to the words "or otherwise," which do not appear in the corresponding section of the City of London Police Act, 1839, but it is suggested that they were inserted ex cautela and must mean something analogous to extra-parochial. At any rate, the language is not sufficiently explicit to take away the special statutory exemption previously granted. This point is concluded in the appellants' favour by the decision of this House in *London Corporation* v. *Netherlands Steamboat Co.* (3) As to the police rate, the City of London Police Act, 1839, relates to the same purpose as 10 Geo. 2, c. 22, whereby the nightly watch was established, namely, the protection of the persons and property of the inhabitants of the City, though the methods are improved, and the police rate is substantially the old watch rate. As to the first point, the words of the exemption are apt to cover future rates, and it is unreasonable to limit it to existing rates. The statute is in the nature of a parliamentary bargain between the London Corporation and

(1) [1901] 1 K. B. 617. (2) [1915] A. C. 674.
(3) [1906] A. C. 263.

the riparian owners and ought to be construed most strongly against the promoters. A. L. Smith M.R. in *Sion College* v. *London Corporation* (1), in holding that the exemption was limited to existing rates and rates in substitution for existing rates, thought that he was following the interpretation put upon the Act in *Williams* v. *Pritchard* (2), *Perchard* v. *Heywood* (3), and *Rex* v. *London Gas Light and Coke Co.* (4), but those decisions do not bear out that proposition.

In *Williams* v. *Pritchard* (2) and *Eddington* v. *Borman* (5) the exemption was held to apply to taxes imposed by Acts passed subsequently to the Act granting the exemption. In *Perchard* v. *Heywood* (3) it was held that the exemption did not apply to the window tax. Two points were there decided, (1.) that the exemption did not apply to Imperial as distinguished from local taxes—and the appellants do not dispute this—and (2.) that the Act imposing the window tax expressly excluded the exemption. In *Rex* v. *London Gas Light and Coke Co.* (4) the decision was that the exemption applied to the poor rate though imposed by subsequent statutes, and the sole support for the view taken by the Master of the Rolls in *Sion College* v. *London Corporation* (1) is to be found in a dictum of Bayley J. to the effect that the exemption applies to old taxes or others substituted for them, but not to taxes entirely new. That dictum is founded upon a misapprehension of *Perchard* v. *Heywood* (3) and is wrong; but, assuming it to be correct, the rates in question are within the exemption.

P. O. Lawrence, K.C., and *Ryde, K.C.* (with them *Boydell Houghton*), for the respondents. 1. The exemption is limited to burdens existing at the date of the Act or burdens substantially identical with such pre-existing burdens. That is the construction which has been put upon the Act from the beginning, and it is too late now to overrule it. In *Williams* v. *Pritchard* (2) and *Eddington* v. *Borman* (5) the taxes, though in form new, were really old taxes, and the decision in both those cases proceeded upon the assumption that the exemption was limited to existing burdens. In *Rex* v. *London Gas Light and Coke Co.* (4) again the decision proceeded on

(1) [1901] 1 K. B. 617.
(2) 4 T. R. 2.
(3) 8 T. R. 468.
(4) 8 B. & C. 54.
(5) (1790) 4 T. R. 4.

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the basis that the subsequent Acts had made no alteration in the poor rate, and Bayley J. in terms lays down the law in accordance with the respondents' contention. In *Sion College* v. *London Corporation* (1) and in *London Corporation* v. *Associated Newspapers* (2) it was assumed that the effect of the early decisions was to limit the exemption in the way above stated. In the latter case it became unnecessary to decide whether this interpretation was correct, but Lord Loreburn arguendo expressed his opinion that where a judicial interpretation had been placed upon a statute 120 years ago it ought not to be disturbed.

2. Both the police rate and the consolidated rate are new rates outside the exemption. As to the police rate, both the purposes and the incidence of the rate are different from those of the watch rate. By the City of London Police Act, 1839, the obsolete system of watch and ward was finally swept aside and the system of day constables was remodelled and extended, and the new rate was distributed throughout the whole City instead of being confined to the wards. In no sense does the new police rate represent the old watch rate. As to the consolidated rate, it brings in a number of objects distinct from the purposes of 6 Geo. 3, c. 26, and it throws upon the ratepayers for the first time the expenses of making the streets and of carrying out improvements in the City. The purposes are so enlarged that the identity of the rate is gone. This is not like the case of the poor rate, which is a rate levied for the relief of the poor, and does not lose its identity by the addition of other purposes. The expression " Consolidated rate " is a neutral term, and the rate has not the same distinctive character. The incidence of the rate also is different, for hospitals and extra-parochial places, which were excluded from the old rate, are included in the new rate. The cumulative effect of these matters warrants the decision of the Court of Appeal in *Sion College* v. *London Corporation* (1) that this is a substantially new rate.

3. The exemption is excluded, so far as regards the consolidated rate, by s. 169 of the City of London Sewers Act, 1848. The words " or otherwise " must refer to the statutory exemption, because the only other way in which an occupier could escape liability for rates was by custom by reason of extra-parochiality. The words " or

(1) [1901] 1 K. B. 617. (2) [1915] A. C. 674.

otherwise " are equivalent to " for any other reason," and except on this view they have no meaning. In the Divisional Court *Sion College* v. *London Corporation* (1) was decided on the exclusion of the exemption. The dictum of Lord Davey in *London Corporation* v. *Netherlands Steamboat Co.* (2) must be read in connection with the Act which was there being dealt with. [They also referred to *Westminster Corporation* v. *Gordon Hotels* (3) and *Rex* v. *London Assessment Committee.* (4)]

Sir R. Finlay, K.C., replied.

The House took time for consideration.

July 27. VISCOUNT HALDANE. (5) My Lords, the first question to be decided on this appeal is that as to the construction of s. 51 of the 7 Geo. 3, c. 37. This Act provided for various improvements to be effected within the city of London, and, among them, for the reclamation of land forming part of the bed of the river Thames. The 51st section provided that the land reclaimed should vest in the owners of the adjoining wharves or grounds " free from all taxes and assessments whatsoever." The question has arisen whether the exemption relates only to taxes and assessments the existence of which dates back to the time when the Act was passed, or whether it extends to taxes and assessments which have subsequently been imposed and which are not mere substitutes for such as existed when the statute first became operative.

The question arose on a special case stated for the opinion of the High Court, which raised the point of the validity of a general rate made by the respondents, under which it was sought to rate the appellants as owners of land reclaimed from the Thames about 1766 under powers conferred by the enactment referred to. It is agreed that the " general rate " is to be treated as divisible—that is to say, as though certain special rates included in it were separate rates and not one entire rate. The only separate items of rate to which it is necessary to refer for the purposes of this appeal are those for the expenses of paving, cleansing, and improvements and sanitary charges, which are included in what is called the consolidated

(1) [1900] 2 Q. B. 581.
(2) [1906] A. C. 263.
(3) [1907] 1 K. B. 910; [1908] A. C. 142.
(4) [1907] 2 K. B. 764.
(5) Read by Lord Sumner.

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rate, and for expenses in respect of police, which are raised by the police rate.

It has been argued for the appellants that the consolidated rate and the police rate, with variations which do not destroy their identity, have been in continuous existence from, and date anterior to, the statute. It is, however, plain that this question is important only if the exemption does not extend to rates imposed subsequently to the passing of the statute.

On this point the Divisional Court, consisting of Channell J., Scrutton J., and Bailhache J., took the view that the Act of George III. conferred no exemption from future rates and taxes, and that while the police rate was old the consolidated rate was new and therefore outside the exemption. The Court of Appeal, consisting of Swinfen Eady, Phillimore, and Bankes L.JJ., agreed with the Divisional Court that the exemption did not extend to future rates and taxes, but held that both the rates were new rates and were therefore payable. The Courts below concurred in holding that the question as to the construction of the words of exemption in the Act of George III. was settled in a fashion binding on them by the decision of the Court of Appeal in *Sion College* v. *London Corporation.* (1) It was there decided by A. L. Smith M.R., Collins L.J., and Romer L.J. that the exemption was confined to the rates which existed when the Act of George III. was passed, and such others as had been merely substituted, and further that the consolidated rate, which was levied under the City of London Sewers Act, 1848, was, in reality, a new assessment, and consequently not within the exemption. They thought that a series of decisions of long standing, comprising *Williams* v. *Pritchard* (2), *Perchard* v. *Heywood* (3), and *Rex* v. *London Gas Light and Coke Co.* (4), had settled the construction of the exempting words and had limited their operation to what existed when the Act passed. They laid stress on what was said by Bayley J. in the last of these cases, in which he made a reference to the house and window tax. He observed that the tax "was a new one imposed after the exemption was given; and the exemption may be considered analogous to a covenant to pay taxes which applies to old taxes or others substituted for them,

(1) [1901] 1 K. B. 617.
(2) 4 T. R. 2.
(3) 8 T. R. 468.
(4) 8 B. & C. 54, 62.

but not to taxes entirely new, unless there are express words to give it such extensive operation."

My Lords, I am unable to see how there can be any principle of unrestricted application which determines the construction of such a covenant. The question must, in each case, depend on the meaning of the particular words used. The covenant may well, subject to what the Legislature may see fit then or thereafter to enact, provide by whom the burden of future taxes and assessments is to be borne. The decision in the *Sion College Case* (1) is now before your Lordships for review, and it is necessary in reviewing it to come to a conclusion on two points. One of these points is whether the natural meaning of the exempting words extends to future taxes and assessments, and the other is whether there is a series of decisions of old standing agreeing in a construction of the words which, whether it be the strictly natural construction or not, is one so well established that much property has changed hands on the footing of its validity, and it would therefore be wrong to refuse to apply a familiar maxim. As Lord Campbell said in *Gorham* v. *Bishop of Exeter* (2), "Were the language . . . . obscure, instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long-continued usage. There would be no safety for property or liberty, if it could be successfully contended that all lawyers and statesmen" (in the case of the latter by leaving the words unrepealed) "have been mistaken for centuries as to the true meaning of an old Act of Parliament." Or, as Lord Westbury stated the principle in *Morgan* v. *Crawshay* (3): "If we find a uniform interpretation of a statute upon a question materially affecting property, and perpetually recurring, and which has been adhered to without interruption, it would be impossible for us to introduce the precedent of disregarding that interpretation. Disagreeing with it would thereby be shaking rights and titles which have been founded through so many years upon the conviction that that interpretation is the legal and proper one, and is one which will not be departed from." But in a subsequent case in this House, *Clyde Navigation Trustees* v. *Laird* (4), Lord Blackburn and

(1) [1901] 1 K. B. 617.
(2) (1850) 19 L. J. (Q.B.) 279, 285.
(3) (1871) L. R. 5 H. L. 304, 320.
(4) (1883) 8 App. Cas. 658.

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Lord Watson were careful to point out that this doctrine cannot prevail against a clear expression in a modern statute. If, indeed, there are ambiguous expressions in an Act passed a long time ago, they thought it legitimate to refer to the construction put upon these expressions throughout a long course of years by the unanimous consent of all parties interested, as evidencing what must, presumably, have been the intention of the Legislature at that remote period.

My Lords, I think it must be carefully borne in mind that before resort can be properly invoked to what has been called "contemporaneous exposition" it is essential to show that the interpretation relied on has been distinct and has been substantially uniform. It is therefore necessary to see whether the authorities on the point before us have been in this sense decisive of it.

Of these authorities, the first is *Williams* v. *Pritchard* (1), decided in 1790. It was there held that the land reclaimed under the Act of 7 Geo. 3 was not assessable for land tax levied under an Act passed subsequently. But the real ground on which Lord Kenyon's judgment proceeded was that, although in form the land tax was raised by a statute passed annually, yet the tax was an old and well-understood one, and the annual statutes passed from time to time were to be taken as merely continuing what already was in existence, and ought not to be interpreted as repealing a provision which in general terms exempted the lands in question from taxes which included land tax. In *Eddington* v. *Borman* (2) Lord Kenyon had to construe a statute of 11 Geo. 3, c. 29, which imposed a consolidated rate for drainage, paving, &c. The rate was imposed on "those who by the laws now in being are or shall be liable to be rated towards the relief of the poor, such rates to be ascertained by the rates at which such lands, houses, &c., shall be assessed towards the land tax." It was held by the Court of King's Bench that the liability was limited to those liable for poor rate, and that this was really an old rate which had existed since the time of Queen Elizabeth, and was therefore within the exemption.

My Lords, in neither of these cases was it necessary to decide, nor was it decided, that the words of exemption were confined to existing taxes and assessments.

(1) 4 T. R. 2. (2) 4 T. R. 4.

Nor did the judgments of Lord Kenyon and the other judges of the King's Bench who in 1800 decided the next case relied on (*Perchard* v. *Heywood* (1)) carry the matter further. For there the only question was whether the land reclaimed was exempted from the house and window tax imposed by the 38 Geo. 3, c. 40, an Act which provided that there should be no exemption unless expressly provided by the Act itself, notwithstanding any former statute to the contrary. It was, of course, held that there was no exemption. It is true that Lord Kenyon, in his judgment, puts the result on an additional reason, that the exemption really related only to local taxes, and that while the land tax, which was levied by local apportionment on owners by the City of a general burden imposed on it, was in a material aspect a local rate, the house and window tax was not. The important point is that it was not necessary to decide, nor was it decided, that the exemption was restricted to existing taxes and assessments.

In *Rex* v. *London Gas Light and Coke Co.* (2) the question was whether the words of exemption covered the poor rate. It was decided that they did, inasmuch as the statutes subsequent to that of the 7 Geo. 3 related only to the mode of making and raising assessments for poor rate, and did not create a new subject-matter distinct from that called into existence by the statute of Elizabeth. Moreover, the poor rate resembled the land tax in this, that the amount to be raised by the district was left to be apportioned locally among those within the district. Lord Tenterden C.J. went no further than this, and Holroyd J. gave no reasons for concurring. It is true that Bayley J., in words to which I have already referred, went on another ground. He said that "the house and window tax was a new one imposed after the exemption was given; and the exemption may be considered analogous to a covenant to pay taxes which applies to old taxes or others substituted for them, but not to taxes entirely new, unless there are express words to give it such extensive operation." The judgments of the other judges indicate, as I have already pointed out, no adoption of this opinion.

My Lords, I have come to the conclusion that the learned judges in the Court of Appeal who decided the *Sion College Case* (3) did so

(1) 8 T. R. 468. (2) 8 B. & C. 54, 62.
(3) [1901] 1 K. B. 617.

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under a misapprehension as to the effect of the authorities which I have now examined. With the exception of the language used by Bayley J. in *Rex* v. *London Gas Light and Coke Co.* (1), there is nothing in them which bears out the view on which the Court of Appeal rested their judgment, and what Bayley J. laid down was a mere dictum of that learned judge, unnecessary for the decision of the case. I therefore turn to the language of the statute itself with the sense that I am free to consider the question of the construction of the excepting words as one in which this House has merely to perform the duty indicated in the language which I have referred to of Lord Watson in *Clyde Navigation Trustees* v. *Laird.* (2)

The context of s. 51 throws no light on the question before us. Sect. 52 enacts that when the ground has been enclosed or embanked by or at the expense of the owner or proprietor of the adjoining wharf or ground, a quit rent of a farthing a foot shall be paid to the City, and that where the City has itself done the work, the quit rent shall be a penny a foot. The object was to encourage the adjacent proprietors to reclaim the land themselves. It was doubtless to encourage this that not only did s. 2 provide that it should be lawful for the adjoining owners, if they gave proper notice of their intention to do so, to enclose and embank the ground and soil of the river contiguous to their properties, but s. 51 provided that the ground so enclosed was to vest in them "free from all taxes and assessments whatsoever."

My Lords, these words occur in a public statute. Whether they bear an analogy, as has been said, to the terms of a bargain between the City and the wharf owners does not seem to me important, excepting on one point. I think that from the context and purpose with which it is introduced the expression "taxes" means local and not Imperial taxes, and that the exemption is confined to these. But subject to this it appears to me that the words used by the Legislature are not ambiguous. They occur in a public Act, and extend in terms to "all taxes and assessments whatsoever," and the natural meaning seems to me to include local taxes and assessments, whether then existing or thereafter to be imposed. No doubt the Legislature could, by a subsequent Act, have repealed or

(1) 8 B. & C. 54, 62. (2) 8 App. Cas. 658.

altered the exemption. It is said that this was done in the case of the consolidated rate, as to which part of the controversy has arisen, by s. 169 of the City of London Sewers Act, 1848, under which the rate is levied. That section enacts that the rate may be made by the alderman and the majority of the common councilmen of each ward in the City upon every occupier of a house or building within the City, or partly within and partly without it, "whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place, *or otherwise*." Sect. 173 further enacts that if at any time the rate for the relief of the poor shall, in the judgment of the Commissioners of Sewers, be an unfair criterion by which the rates under this Act should be made, or in case any person liable to be rated under this Act shall not be liable to be assessed to the relief of the poor by reason of such house or building being situate in any precinct or extra-parochial place, *or otherwise*, the Commissioners may cause a valuation to be made for the purpose of determining the rate.

My Lords, in the case of *London Corporation* v. *Netherlands Steamboat Co.* (1) the words in s. 169 of the City of London Sewers Act were interpreted by this House. A statute of 1812 had enacted that a fixed composition in lieu of rates which had been voluntarily paid by the Treasury in respect of Crown property in the City should be paid every year for ever out of the Consolidated Customs to the rate collectors, and that the premises should be exempt from all rates and assessments though they might become private property. A statute of 1832 repealed so much of the Act of 1812 as made the composition payable out of the Consolidated Customs, and enacted that the collectors should collect the composition, and no more, from the occupiers of the property, which was then about to be sold by the Treasury. The premises having become private property, it was attempted to assess the occupiers to rates under the City of London Sewers Act, 1848. It was held by Lord Halsbury, Lord Davey, Lord James of Hereford, and Lord Robertson that the exemption in the statutes of 1812 and 1832 applied to future as well as to existing rates, and that it was not affected by s. 169 of

(1) [1906] A. C. 263.

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the Act of 1848. It was said that the language of that section was not sufficiently explicit to repeal by implication an express statutory exemption in the earlier Acts, which extended to "the payment of all and all manner of rates and assessments, although the same and each and any of the said premises may become private property by the sale or assignment thereof to individuals, all law, usage or custom to the contrary notwithstanding." I think that this is a decision which applies, and which we are bound to follow, on the construction of s. 169. The words are not sufficiently clear to operate by way of repeal of exemptions given in express terms. They may indeed be construed as confined to matters relating to poor rate. And I think, further, that it is evident that the noble and learned Lords who decided the case were of opinion that, even assuming the consolidated rate imposed by the Act of 1848 to be a new one, the exemption must be construed as extending to it. For there is no passage in any of the judgments which suggests that they based their decision on this point on the view that the rate was in reality merely an old one.

In the recent case in this House of *London Corporation* v. *Associated Newspapers* (1) (the present respondents and appellants) the question of exemption under the words in the Act of George III. was raised in connection with the title of the guardians of the poor to levy rates which they were directed by precepts to impose in aid of the Education Acts of 1902 and 1903, and other county purposes, such rates to be paid in like manner as the money required by the guardians for the relief of the poor. It was held that the exemption applied to the reclaimed land on the ground that it was not rateable to the relief of the poor, and by a majority of your Lordships on the additional ground that the poor rate was one and indivisible. On the point in controversy in the appeal now before us no opinion was expressed, and there was no reason to express one.

I have dealt with the relevant authorities thus fully in order to make it clear that, in my opinion, they do not preclude us from attributing to the words of the Act of George III. what seems to me to be their natural operation—an operation which extends to future as well as to then existing rates. The result is that it

(1) [1915] A. C. 674.

becomes unnecessary to consider whether the police rate or the consolidated rate can be regarded as being merely old rates imposed under new statutory conditions and variations which do not affect their identity with rates existing antecedently to that statute. I am accordingly of opinion that this appeal ought to succeed, and that it should be held that the appellants are not liable to pay any of the sums referred to in the special case as sought to be assessed on them.

LORD SUMNER. My Lords, the first question on this appeal is whether the words "free from all taxes and assessments whatsoever" in 7 Geo. 3, c. 37, s. 51, received between 1790 and 1828 an interpretation which excluded from the exemption imposts created thereafter otherwise than in continuation of old ones. The second is whether such interpretation was wrong. The third is whether, if wrong, it ought now to be overruled. Shortly, the question is whether the decision of the Court of Appeal on this part of the *Sion College Case* (1) should now be reversed. Your Lordships kept the point open last year without any indication of opinion one way or the other.

Of the early cases *Williams* v. *Pritchard* (2) is the most material. It governed *Eddington* v. *Borman* (3), and was followed in *Rex* v. *London Gas Light and Coke Co.* (4) *Perchard* v. *Heywood* (5) is important for one passage in Lord Kenyon's judgment, but otherwise proceeds on the distinct ground that the later statute then in question excluded the operation of 7 Geo. 3, c. 37, s. 51. The Court of Appeal in 1901 held in terms that the decisions between 1790 and 1828 had given a settled meaning to that exemption and accepted that meaning, and the view that the exemption was then currently so treated is supported by the fact that the very experienced counsel, now Avory J., who appeared for parties then in the same position as the present appellants, did not contend for anything wider than an exemption from assessments which though imposed by statutes passed after 1767 were of the same kind as those then in existence. Subsequently in *Jonas* v. *Overseers of*

(1) [1901] 1 K. B. 617.
(2) 4 T. R. 2.
(3) 4 T. R. 4.
(4) 8 B. & C. 54.
(5) 8 T. R. 468.

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St. Dunstan-in-the-West (1), a case not directly governed by the *Sion College Case* (2), the Court of Appeal again accepted the same construction of the words in question.

My Lords, a decision that the exemption in question freed the land from all rates, present and future, unless and until some later Act should otherwise provide, would have made an end at once of all the arguments considered in the land tax cases and the poor rate case. It was a construction patent on the face of the section. It could not have been overlooked, and though technically these cases could be, and were, decided on other grounds, I can conceive no reason for doing so that does not involve the tacit rejection of this wide construction of the exemption.

What then was Lord Kenyon's reasoning in *Williams* v. *Pritchard?* (3) He asks whether the premises are liable to be taxed under an Act passed since the year 1767, when the exemption from taxes was enacted. He does not answer "No; because the exemption of 1767 extends to future taxes, and the Act of 1787 says nothing about the exemption of 1767." His answer, as I read it, is "No; because land tax existed in 1767 and was exempted in 1767, and land tax under the Act of 1787 is really only the old land tax of 1767, and so is exempted still." If so, the remark in *Eddington* v. *Borman* (4) that it is concluded by *Williams* v. *Pritchard* (3) is quite natural. So it was if the point was "Did this tax in substance exist in 1767?" for 11 Geo. 3, c. 29, defined the tax as to persons liable by the poor rate and as to rate by the land tax, but if the point was "all taxes are exempted by the Act of 1767, unless and until, by some Act after 1767, this exemption is prevented from operating," then the case was not concluded by *Williams* v. *Pritchard* (3), for the only question then would be "Is there anything in 11 Geo. 3, c. 29, to prevent the exemption of 1767 from operating?" And the answer must have been simply "No," without discussion of the nature of the tax which it imposed.

These cases dealt with the operation of the exemption of 1767 itself. The question of its repeal by subsequent legislation is a different one. This question has only been dealt with in *Perchard*

(1) (1908) 72 J. P. 157.
(2) [1901] 1 K. B. 617.
(3) 4 T. R. 2.
(4) 4 T. R. 4.

v. *Heywood* (1), where all the judges decided that an express clause, contained in the later Act, prevented the operation of the exemption contained in the earlier Act. Lord Kenyon, however, refers to *Williams* v. *Pritchard* (2), and, as has been argued, in such a way as to show that he had construed the exemption of 1767, in both cases, as applicable to future as well as to existing imposts. I cannot, with deference, so read him. Two taxes were involved—window duties, imposed indeed in 1798, but " in lieu of those which existed before the exemption contended for was created," namely, under 6 Geo. 3, c. 38, and earlier legislation still; and aid and contribution tax, imposed in the same year, but " the rate of which was to be ascertained by the quantum of duty payable by the plaintiff for his house and windows." It was argued, inter alia, as to window duties, " This is like land tax and *Williams* v. *Pritchard* (2); it is substantially an old tax existing before 1767, though re-imposed in a more convenient form since; and as to aid and contribution tax it is like *Eddington* v. *Borman* (3), a case of a new and subsequent impost measured by the incidence of an old one." To this Lord Kenyon virtually replies " No; those cases were right, but they are not this case. Land tax was, in substance, an old tax; window tax is not." In this view of window tax he may have been right or wrong, but plainly what he means is to ask, " Does the later Act give the plaintiff an applicable exemption since the earlier Act does not?" As he puts it, " This Act was passed in the seventh year of the present reign, and the others, under which the plaintiff was assessed, were not made till the 38th year of the reign, and the only question is whether or not the last, which impose taxes on all persons . . . . exempt the persons who were exempted in the first." He held that they did not. If he thought that the exemption of 1767 in itself extended to subsequent taxes, his observation ought to have been that the Land Tax Acts subsequent to 1767 contained no words sufficient to abrogate the exemption then granted; for had they done so they would have been effectual repeals, notwithstanding the fact that land tax under annual Acts was an existing tax in that year. What he does is to say of *Williams* v. *Pritchard* (2), " If that

(1) 8 T. R. 468, 472. (2) 4 T. R. 2.
(3) 4 T. R. 4.

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decision do not affect this case, it seems perfectly clear that the plaintiff is liable" ; in other words, "it was because land tax was an existing tax in 1767 that the section in question relieved from it ; but in a case like the present, which, as I think, is not affected by *Williams* v. *Pritchard* (1), the plaintiff's liability is clear, for any benefit from the exemption of 1767 is taken away." I think that Lord Kenyon's reasoning with regard to land tax, twice repeated, is inconsistent with his having taken the view that the exemption could of itself extend to new taxes. Unless he meant to negative that view quite decisively, his argument as to the identity of the permanent land tax with the annual land tax was a superfluous subtlety, for although his view of the nature of land tax has held its own ever since, and has been recently applied to income tax —*Stewart* v. *Thames Conservators* (2)—still in 1790 it certainly was an ingenious way of getting over the fact that the land tax Act of 1787 was a later statute than the Act of 1767, and need not have been resorted to if the exemption of 1767 in its terms had applied to taxes enacted subsequently to 1767. The poor rate case in 1828 (3) simply follows the land tax case. Probably in doing so the Court carries matters no farther, though I think Lord Tenterden may have had some doubt as to its principle, and the comparison to a covenant which is made by Bayley J., whether right or wrong, shows clearly that he thought that principle not so clear that it would not be the better for some reinforcement.

During the argument on this point at your Lordships' Bar, no other statutes and no other cases than those I have referred to were brought to your Lordships' attention. Still, exemptions to the same effect and very similar in language are to be found in other Acts, and there have been a good many decisions upon them. Down to the middle of the last century such exemptions were common, particularly in Improvement and in Inclosure Acts, and I have examined the decisions upon them wherever I have been able to find any. If general words, particularly where an Act exempts "any" subject-matter from "all" imposts, ought to be read in their literal sense without implied limitations, one would have expected to find decisions to that effect. My Lords, I can find

(1) 4 T. R. 2.
(2) [1908] 1 K. B. 893.
(3) *Rex* v. *London Gas Light and Coke Co.*, 8 B. & C. 54.

no case in which such an interpretation is accepted, but there are cases of authority to the contrary, though none, so far as I know, on the very words of this section. For example, the Land Tax Act (4 Will. & Mar. c. 1) provides, in substance, that "nothing contained in this Act shall extend to charge any hospital." This exemption was annually re-enacted till 1798, when the 38 Geo. 3, c. 60, made it perpetual. The judgment of the entire Court of Queen's Bench in *Lord Colchester* v. *Kewney* (1) declares, inter alia, that "from a strict construction of the words of the exception," the exemption in question, namely, "nothing in this Act contained shall extend to charge . . . . any hospital . . . . in respect of the sites of the said hospitals" (38 Geo. 3, c. 5, s. 25), is confined to subjects of exemption existing when the Act was passed. The unanimous judgment of the Exchequer Chamber (2) affirms this, for Willes J., delivering the judgment of the Court, says: "We have before us the case of property not exempted when either the former (38 Geo. 3, c. 5) or the latter Act (38 Geo. 3, c. 60) passed." Accordingly the hospital in question, being founded in 1857, was held liable to the land tax for that reason. Thereupon, in *Cox* v. *Rabbits* (3), Lord Blackburn says of a hospital existing before 1693: "The 25th section of the Act 38 Geo. 3 applies thus far; it speaks of 'any hospital,' that is to say, any hospital existing at the time of the passing of the Act of 38 Geo. 3, whether existing in William III.'s time or not, and says that if it existed at the time of the passing of the Act of 38 Geo. 3, no such hospital shall be charged in respect of its site." Finally, in *Westminster Corporation* v. *Johnson* (4) Stirling L.J. says, on the authority of *Lord Colchester* v. *Kewney* (5), "This exemption extends only to lands held by such institutions at the date when the tax was made perpetual." My Lords, if the construction thus applied to the exemption given by 38 Geo. 3, c. 5 and so long accepted, is sound, I fail to see why a wider construction should be given to the words of s. 51 of 7 Geo. 3, c. 37, differently phrased though they be.

It is argued that we have here a parliamentary bargain, and that for that reason the words of exemption ought to be given the widest

(1) (1866) L. R. 1 Ex. 368, 380.
(2) (1867) L. R. 2 Ex. 253, 256.
(3) (1878) 3 App. Cas. 473, 480.
(4) [1904] 2 K. B. 737, 747.
(5) L. R. 1 Ex. 368; L. R. 2 Ex. 253.

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scope contra proferentes. On examination of the statute I think that this argument fails. The exemption is an incident of the land reclaimed, and that land the statute vests in the former riparian proprietors. It is not known whether all or any of them exercised the right of embanking their frontages at their own expense. It is not known whether the estimated total cost—7500*l.*—was exceeded or not. It is not known whether it bore a high or an insignificant proportion to the value of the land reclaimed. The statute itself shows that the grant of the reclaimed land and the exemption were not the reward of private enterprise, for the benefit of the reclamation is given to the riparian proprietors, whether they do or do not reclaim the land for themselves. It is true that those who reclaim pay a small quit rent, and those who do not a much larger one ; but in neither case has the quit rent any relation to the cost of embanking, for it is measured by the area of the land reclaimed and not by the frontage of the embankment erected. Further, the quit rent has nothing to do with rating. It goes not to the general City funds, but to the cost of upkeep of the Blackfriars Bridge. Accordingly I fail to derive any guidance from these considerations. A statutory boon, which falls alike on those who merit it and those who do not, carries the meaning of the statute no further. The simple enjoyment of it is not a consideration, moving from the grantees, sufficient to extend the exemption to future imposts, if the words in themselves fall short of doing so. In the case of some rates the City authorities may have been the rating authority in 1767, though generally the rates were made either by the authorities of the wards or by the surveyors of the parishes, but in no case was the question between the riparian proprietors and the City authorities a mere question of the incidence of rates, which one or the other would have to pay. Where rates would fall on the riparian proprietors as occupiers in the first instance, s. 51 does not make the City liable to indemnify them. Where the City authorities levy the rate, of course as a statutory duty, s. 51 does not relieve them from their duty, but relieves the riparian proprietors from the burden. The bounty is the bounty of the Legislature, and I cannot see how its construction is affected, though it be the fact that the City had made some bargain, the terms of which are now unknown, and was the active promoter of the statute, which passed as a public Act.

My Lords, the view, taken as I conceive in Lord Kenyon's time, of these exempting words was already a century old at the time of the *Sion College Case* (1), and fifteen more years have passed since then. The area in question has long been covered with buildings and is of great value. I cannot doubt that the sites within it have been long and often dealt with upon the common footing that this exemption went no further than the decisions of 1790 were understood to carry it. Furthermore, it is reasonable to suppose that when the City of London Sewers Act, 1848, was passed, the Legislature, in enacting new sewer rates and consolidated rates, was cognizant of Lord Kenyon's decisions, and forbore to insert words excluding the operation of the exemption of 1767, because under those decisions that exemption did not apply to new rates subsequently enacted. This being so, I conceive that the case falls within Lord Westbury's well-known words in *Morgan* v. *Crawshay* (2) which have already been brought to your Lordships' notice, and that after the lapse of 126 years this long-standing construction should not be overruled.

Even if the construction of the words in question were bare of authority, I am not persuaded that the more limited construction of them is wrong. The " taxes and assessments " spoken of can only be imposed by the authority of some statute, and the exempting enactment itself operates, at the moment when it becomes law, on existing imposts only. It cannot bind future legislation. A new Act imposing new rates and taxes can only be affected thereby, if the Parliament which passes it so wills and expresses that will directly or indirectly in the language of the new enactment. In their operation on existing imposts the words in question are an effective exemption. They do not so operate on future imposts ; as to these, they are at most words raising a presumption as to the meaning of the Legislature whenever it passes future taxing Acts. Without them a future Act must exempt expressly, if there is to be any exemption at all. With them there is some presumption, though not a strong one, that the later statute bestows exemption from the new tax, unless its actual language negatives such an intention. To my mind it is not the natural construction of the statutory words in question to read them as uno flatu relieving

(1) [1901] 1 K. B. 617. (2) L. R. 5 H. L. 304, 320.

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from a burthen that now exists and preparing the ground for a special construction of statutes hereafter creating burthens which do not yet exist. It is more natural to read the words as only purporting to do that which the Legislature, when it uses them, is competent to do. Very possibly the nature of the legislation or the context of the exemption may outweigh this consideration, as for example in such public general enactments as the Militia Law Amendment Act, 1854 (17 & 18 Vict. c. 105), s. 2, or 26 & 27 Vict. c. 65, s. 26, relating to volunteers and their armouries, or the Merchant Shipping Act, 1894, s. 731, relating to lighthouses and buoys, or the Voluntary Schools Act, 1897, s. 3. These provisions, so far as I know, have not been the subjects of decision, and I express no opinion about them. It seems to me, however, that the object and context of the present exemption give no ground for reading it in any sense beyond that of giving effect to that which was immediately in the power of the Legislature in 1767. The word "whatsoever," so much relied on, is in my opinion inconclusive. Had not Parke B. said in *Palmer* v. *Earith* (1) that "whatsoever" enlarges the operation of an exemption clause, I should have thought that it left matters where they were. "All . . . . whatsoever" is simply "all"; beyond "all" there is nothing more. If, however, there is to be "enlargement," sufficient sense is given to the word by reading it as "all sorts of taxes," Imperial taxation of course excepted. This seems to me to harmonize the decisions. First of all, an exemption from rates, that is existing rates, is not lost by subsequent alterations in those rates so long as their identity is preserved; secondly, where a subsequent Act re-enacts, whether for the year or permanently, a tax which was in existence as a temporary imposition at the date of the exemption, it may be reasonably read as impliedly continuing the exemption, when it continues or perpetuates the tax, even though no express words are used for the purpose. This is what I think that Lord Kenyon meant.

My Lords, having the misfortune to fail to agree with your Lordships on the construction of the section, I must, to my regret, detain your Lordships while I examine the rates themselves, which are the subject of the present appeal, to see if the exemption of 1767 applies to them or not. There is here a levy of a general rate—

(1) (1845) 14 M. & W. 428.

it includes two separate rates, the police rate and the consolidated rate. The respondents admit that some other imposts of very small amount, which complete the total of the general rate, may for present purposes be disregarded. The police rate may be disposed of shortly. The only tax or assessment existing in 1767 in connection with police purposes was imposed by 10 Geo. 2, c. 22. The first section empowered and required the Mayor and Corporation of London to fix the number of watchmen and bedels proper to be kept in each ward, and to direct how they should be armed and paid and how long they should keep watch. Sect. 2 proceeds: "And for the better raising and levying of monies for paying the wages of the said watchmen and bedels" the same authority is "empowered to determine and direct what sum or sums of money shall be raised and levied upon each respective ward for answering the purposes aforesaid"; and then it is to direct the authorities of each ward to make the necessary rate on occupiers within the ward. The ward authorities in turn have to make and levy the rate and choose "honest and able-bodied men to be employed as watchmen." It is unnecessary to go through the numerous and important distinctions that have been pointed out between the watch of the thirty years after 1737 and the modern City Police. In my opinion, the only rate connected with police purposes from which the appellants' lands enjoyed a statutory exemption was a rate for the purpose of paying the wages of watchmen and bedels appointed by the authorities of each ward to keep watch therein by night. That force is a thing of the past, and has been for nearly ninety years, and, so far as police rates go, the exemption passed away with it.

The present consolidated rate arises under the City of London Sewers Act, 1848. The case is not, as it was with the poor rate in last year's appeal, the case of an old rate, existing in 1767, but so modified in its incidence or so burthened by the Legislature with new purposes as to raise an argument that it has been transformed into a new thing under an old name. When the Act of 1767 was passed a statutory rate was in existence under an Act of the previous year for paving, cleansing, and lighting the streets and other places in the City. It had no official name that we know of, and so new was it that it can only have been levied in one half-year before the Act

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of 1767 became law. It had, however, a pedigree. The Act of 1766 recited that it would be "convenient to the inhabitants of the City if the rates and assessments necessary for paving, cleansing, and enlightening the streets," and so forth, "were consolidated and made one joint and general fund, to be collected together," and the older rates appear to have been imposed under statutes mostly passed since the Great Fire. The Act of 1766 was partially repealed in 1768 by an Act which, in its turn, was repealed by 11 Geo. 3, c. 29, which repealed what was left of the Act of 1766 and the whole of the Act of 1768. The 11 Geo. 3, c. 29, lasted till 1824, when 4 Geo. 4, c. cxiv., amended part of it and took its place, and in due time the City of London Sewers Act, 1848, superseded it and repealed both the Act of 1824 and the remains of the Act of 1771. This Act, twice modified, namely, in 1851 and 1897, is the authority for the demand of the consolidated rate now in dispute.

Under the system of 1766 the unit of rating was the ward, and the rating authority was the representative body for each ward, that is, its aldermen and common councilmen. Under the Act of 1848 the unit and the rating authority were the same, but this has been completely altered by the City of London (Union of Parishes) Act, 1907, under which the rating unit now is the whole of the city of London and the rating authority is the Common Council of the City. This is not an enactment which merely makes the present rating authority the statutory successors of the rating authority of 1766; it substitutes a new machinery and gets rid of the old one. The ratepayers of 1766 were occupiers who were liable to be and actually were rated to the relief of the poor; those of 1848 and since are occupiers, whether liable to be assessed to the relief of the poor or not. On the other hand, provision was made under the Act of 1766 for the rating of unoccupied premises and of parish churches and other public buildings, a system differing widely from that now existing. It is true that the paving and lighting rate of 6 Geo. 3 and the consolidated rate of 11 & 12 Vict. were both subject to a maximum limit of eighteenpence in the pound, but the alteration in rateable values makes this of little moment. Finally, the rates which were consolidated in 1766 were rates for the purposes only of paving, cleansing, and enlightening existing streets, and so forth, and of preventing annoyances therein, such as the erection and main-

tenance of posts, steps, cellar doors, show glasses and show boards, and such like. On the other hand, the consolidated rate of 1848 was an omnibus rate to provide funds for the execution of the general powers of the Commissioners of Sewers, other than sewerage and drainage powers (for I assume, for present purposes, that the repetition of such powers in the part of s. 168 which deals with the consolidated rate, though they have already been dealt with under the sewer rate, is a mere oversight). The mere name " consolidated " is nothing, for there is no consolidation. The rate had to be called something, and might as well have been called anything else. The mere name of the rate of 1848 imports no identity with the rates which, for convenience, were consolidated and collected into one fund without a name in 1766. The general powers of the Commissioners under the Sewers Act of 1848 are very wide and very various, and they have been freely added to by periodic legislation ever since. They include objects as wide as City improvements and public health, and as minute as the regulation of slaughter-houses and the naming of streets. I have come to the conclusion that the consolidated rate now in debate is neither substantially identical with the streets rate enacted in 1766 nor a statutory substitution for it. The leading indicia which were present in the poor rate case last year are absent here. True a part, and that an ascertainable part, of the present impost is for street cleaning purposes, as was the rate of 1766, but when everything else is different some small community of purpose does not suffice to establish identity. I am therefore of opinion that the decisions of the Court of Appeal, both in the *Sion College Case* (1) and in the judgment now under appeal, were right, both as to the construction of the words of exemption in s. 51 and as to the character of the consolidated rate, and I think that the appeal fails.

I only desire to add that, in my view, the words " or otherwise " in s. 169 of the Act of 1848 are not sufficient to repeal the exemption of 1767. At best they are so ambiguous that they ought not to be construed to affect what is virtually an established private right in the nature of property, but I am further of opinion that this question was decided by your Lordships' House in *London Corporation* v. *Netherlands Steamboat Co.* (2)

(1) [1901] 1 K. B. 617. (2) [1906] A. C. 263

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LORD PARMOOR. (1) My Lords, the question raised in this appeal is whether the appellants, who occupy certain hereditaments within the city of London, are liable to pay so much of the general rate as is attributable to (1.) the consolidated rate, (2.) the police rate. The hereditaments form part of an area of land reclaimed from the river Thames under the public Act 7 Geo. 3, c. 37. The land reclaimed was vested in the owner or owners, proprietor or proprietors, of the adjoining wharves and grounds according to their respective interests "free from all taxes and assessments whatsoever."

In *Sion College* v. *London Corporation* (2) the Court of Appeal decided that the exemption applied only to existing taxes and assessments, and not to substantially new ones coming into existence at a later date, and that the consolidated rate was substantially a new assessment and therefore not within the exemption. The present case is, in substance, an appeal against this decision.

Four earlier cases are referred to in the Court of Appeal—*Williams* v. *Pritchard* (3), *Eddington* v. *Borman* (4), *Perchard* v. *Heywood* (5), and *Rex* v. *London Gas Light and Coke Co.* (6) Your Lordships' attention has been called to these cases, and it is unnecessary further to consider them in detail. In none of them was the question now in debate directly determined. Reference has been particularly made to a passage in the judgment of Bayley J. in *Rex* v. *London Gas Light and Coke Co.* (6): "The exemption may be considered analogous to a covenant to pay taxes which applies to old taxes or others substituted for them, but not to taxes entirely new, unless there were express words to give it such extensive operation." I doubt whether an argument by analogy founded on a private contract between landlord and tenant is of much assistance in construing the terms of a statutory bargain founded on special considerations inserted in a different context.

The Act of 7 Geo. 3, c. 37, is a public Act, which, so far as relevant to the present case, is an Act for completing the bridge across the river Thames at Blackfriars, and for reclaiming a portion of the north side of the Thames within certain limits. The respondents, in the first place, are required to enclose and embank for the purpose

(1) Read by Lord Wrenbury.
(2) [1901] 1 K. B. 617.
(3) 4 T. R. 2.
(4) 4 T. R. 4.
(5) 8 T. R. 468.
(6) 8 B. & C. 54, 62.

of reclamation, but the owners or proprietors of the several wharves and grounds abutting on the north side of the Thames may, on giving notice before a certain date, enclose and embank so much of the ground and soil of the river as lies opposite and contiguous to their respective wharves and grounds. The reclamation was carried out partly by the respondents and partly by the adjoining owners and proprietors. In whichever way the reclamation is carried out, the reclaimed land vests in the owner or owners, proprietor or proprietors, of the adjoining wharf or ground, according to his, her, or their respective estates, trusts, or interests therein, "free from all taxes and assessments whatsoever." In order to provide a fund for defraying the expense of lighting, watching, cleansing, and repairing the intended bridge, the reclaimed lands are made for ever subject to certain annual quit rents, which are charged upon them. Where the land is enclosed and embanked by or at the expense of the respective owners and proprietors of the adjoining wharves and grounds, the amount of the quit rent is $\frac{1}{4}d.$ per foot superficial measure; and where the reclamation has been carried out by the respondents, the amount of the quit rent is $1d.$ per superficial foot. These quit rents are vested in and made payable to the respondents in perpetuity, subject to a power of redemption at their capitalized value.

What is the nature of this transaction? It is not a case of composition in lieu of local rates and assessments, since the reclaimed lands were not, before reclamation, liable to such rates and assessments, and the quit rents payable in perpetuity are not in aid of such rates and assessments, but only applicable to defray the expense of lighting, watching, cleansing, and repairing the intended bridge. I think that the bargain is intended to maintain the non-liability of the lands to be reclaimed from all rates and assessments whatsoever, in consideration of a special statutory liability imposed on them in perpetuity for the benefit of the respondents in aid of expenditure to be incurred in connection with the intended bridge. I can find no ground to imply any limitation on the generality of the words "all taxes and assessments whatsoever," or to infer that there was not an intention to maintain in perpetuity the non-liability of the reclaimed lands to pay local taxes and assessments, in return for the perpetual charge placed upon them. It was

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argued on behalf of the respondents that the charge imposed is small in comparison with the value of the exemption claimed, but it is impossible to reopen this question, or to attempt to test the sufficiency of a consideration settled in the year 1767. It is, moreover, always within the competency of Parliament to repeal or modify a bargain, sanctioned by statute, if a proper case can be made for such repeal or modification. To prevent misunderstanding, I desire to add that, in my opinion, the bargain has no reference to Imperial as distinguished from local taxation: *Perchard* v. *Heywood.* (1)

Having regard to the opinion expressed that the exemption applies generally to all local taxes and assessments, it is immaterial to consider whether the police rate, or the consolidated rate, with which it is sought to charge the appellants, is substantially a new rate imposed subsequently to the date at which the exemption was conferred.

The only remaining question is whether the rates imposed by the City of London Police Acts and the City of London Sewers Acts are leviable from the appellants notwithstanding the generality of the exemption in 7 Geo. 3, c. 37. The material sections in these Acts are substantially similar, except that in s. 169 of the City Sewers Act, 1848, the words " or otherwise " are added, to which the attention of your Lordships was repeatedly directed during the argument. Sect. 168 empowers the Commissioners to impose " the consolidated rate." Sect. 169 enacts that every person who occupies any house or building within the rateable area shall be liable to be rated " whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situated in any precinct or extra-parochial place, or otherwise." The appellants are occupiers of premises not only " not liable to be assessed to the relief of the poor," but " free from all taxes and assessments whatsoever." In my opinion the words relied upon in s. 169 have no application to the premises occupied by the appellants. Their purport is simply to bring under contribution to the consolidated rate premises which had hitherto escaped liability to the poor rate by reason of extra-

(1) 8 T. R. 468.

parochiality or otherwise. If this is the right construction, it is not necessary to further consider the words " or otherwise " ; but, in any case, I do not think it is possible that general words of this character can be construed as repealing an existing special bargain sanctioned by a previous statute.

The decision of your Lordships in *London Corporation* v. *Netherlands Steamboat Co.* (1) is, in my opinion, sufficient to negative the contention of the respondents, based on s. 169 of the Act of 1848.

My Lords, in my opinion the appellants succeed and the appeal should be allowed with costs.

LORD WRENBURY. My Lords, in the year 1767 was enacted a statute (7 Geo. 3, c. 37) whose purposes included the completion of the Blackfriars Bridge, the redemption of the tolls on Blackfriars Bridge and London Bridge, the rebuilding of Newgate Gaol, the repair of the Royal Exchange, and (which is the relevant matter in the present case) the embanking of part of the north side of the river Thames. The Act recites that it would tend to remove many inconveniences if the ground and soil of the river between certain limits were inclosed and embanked, the expense of which was estimated at 7500*l.*, and empowers and requires the mayor, aldermen, and commons in Common Council assembled to inclose and embank in a defined manner, with a proviso in s. 2 that it shall be lawful for the owners and proprietors of the wharves or grounds abutting on the north side of the river, on giving notice within a limited time, to inclose and embank at their own expense. By s. 51 the ground and soil inclosed and embanked in the front of each wharf or ground is to vest in the owner or proprietor of the adjoining wharf or ground "*free from all taxes and assessments whatsoever.*" By s. 52, in order to provide a fund for defraying the expense of lighting, watching, cleansing, and repairing the bridge, the ground and soil inclosed and embanked are to be for ever subject to a quit rent of a farthing per superficial foot as to so much as is inclosed and embanked at the expense of the owner, and a quit rent of a penny per superficial foot as to so much as is inclosed and embanked at the expense of the mayor, aldermen, and commons. Sect. 53 provides that if the lands are let these quit rents are to be paid by

(1) [1906] A. C. 263.

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the tenants, and s. 54 that if the landlords do the work of enclosing and embanking the tenant shall pay the landlord a further quit rent of three farthings per superficial foot. In either case, therefore, the tenant pays a penny, but if the landlord has reclaimed a farthing of this goes to the City and three farthings to the landlord.

The first and, in my view, the only question which it is necessary to decide on this appeal is the question as to the true construction of the words in s. 51, "free from all taxes and assessments whatsoever."

As a first step towards answering this question, I look to see what were the circumstances under which the Act was passed, and what, upon a review of its language, is the purpose which it set out to effect. Obviously the City was minded, under statutory authority, to make certain improvements within the City. Obviously the City contemplated two alternatives, the one to do the work at its own expense, the other to get it done at the expense of the owners, if they were minded under s. 2 to give notice of their intention to do it. As between the City and these owners there existed the relation of rating authority and rateable owner or occupier. As between those parties the Act, I think, amounted to that which is often spoken of as a parliamentary bargain. Lord Kenyon, in fact, in *Perchard* v. *Heywood* (1) stated it to be such. He called it a contract between the respective parties. The bargain, so far as at present relevant, was that under the above arrangements for doing the work the land was to vest in the owner tax free. From what taxes was the land to be free? That is the question.

At the outset I set out of consideration Imperial taxes. For the purposes of this case I may assume, and do assume, that the exemption is confined to taxes and assessments as between the City as rating authority and the owner or occupier as the party rateable.

With this limitation there are three possible views: (1.) The exemption may be only from all taxes and assessments imposed and existing in 1768, when the lands are to vest; or (2.) the exemption may be from the foregoing and also from all taxes and assessments imposed after 1768, but being the imposition of a tax in subsequent years in pursuance of a right to tax which existed in

(1) 8 T. R. 468, 472.

1768 ; or (3.) the exemption may be from all taxes and assessments which in 1768 were either within (1.) or within (2.), or were not within either of them, but were then altogether future : which were an imposition of a new rate for a new purpose unknown or unacknowledged in 1768.

For the first of these no one contends or could contend. For instance, poor rate had existed since the time of Elizabeth. The exemption could not be from poor rate, at the rate of, say, a penny, which had been made in 1768, but not from poor rate at the rate of, say, twopence made in 1769. Land tax also existed before 1768, but it differed from the poor rate in that it was imposed annually by an annual Act. We shall see presently that a question was raised as to land tax by reason of this fact, but it was held (rightly, as it seems to me) that the exemption was from land tax generally and not from land tax under the annual statute current in 1768. It follows from these first considerations that the words of exemption certainly contemplate futurity. The contest lies between the second and the third views. There is authority in the Court of Appeal for the second. In my judgment it is the third view which is right. I shall have to deal with the authorities, but before looking at them I look first to the words of the Act and seek to find their meaning for myself. To my mind the words " all taxes and assessments whatsoever " are words of the widest possible meaning. They must be limited no doubt by the capacity of the persons as between whom the parliamentary bargain is being made. This may exclude Imperial taxes, but will include every tax to be imposed as between the one contracting party and the other. The word " whatsoever " is a word of the widest meaning. I see no reason for confining it to meaning " of any character whatsoever." Why should it not include " of any date of origin whatsoever " ? It must be borne in mind that this statute, like any other statute, could be repealed or altered by subsequent statute. The owner of the land is, in my view, not acquiring an indefeasible right never to be taxed. The only question is whether there is not a bargain that he shall not be taxed unless a subsequent statute imposes taxation upon him. If wholly unfettered by authority I am of opinion that the words " free from all taxes and assessments whatsoever " mean " free from all present or future taxes and assessments of every kind,"

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excluding probably, as I said before, Imperial taxes, as to which it is unnecessary to say, and I do not say, anything.

The statute having been passed in 1767, there were four decisions upon it in 1790, 1790, 1800, and 1828. The decision in 1800—*Perchard* v. *Heywood* (1)—may be set out of consideration at once. The tax there in question was the window tax imposed by 38 Geo. 3, c. 40. It was an Imperial tax, not a local tax, and the statute which imposed it enacted that no exemption should be allowed other than "such as are contained and expressly provided for in and by this Act, notwithstanding any former statute or statutes to the contrary." Obviously, the exemption in the statute of 7 Geo. 3 could be, and was, as regards that tax repealed by the statute of 38 Geo. 3, if, indeed, the former statute ever conferred any exemption as regards that tax.

The case is, however, of value for the present purpose for the sentence at the top of 8 T. R. p. 473. The question, said Lord Kenyon, is "whether or not the last [Act] which imposes certain taxes on all persons . . . . exempts the persons who were exempted in the first." Obviously this sentence means that the statute 7 Geo. 3, c. 37, had given exemption from the future tax then in question, and the matter for decision was whether the statute 38 Geo. 3, c. 40, had continued the exemption.

The other three cases are these: First, *Williams* v. *Pritchard*. (2) The tax in question was the land tax. That tax was imposed by annual Act, and the question was whether land tax imposed by 27 Geo. 3, c. 5, was within the exemption in 7 Geo. 3, c. 37. It was held to be within the exemption. As I understand Lord Kenyon's judgment, the argument of it is as follows: The 7 Geo. 3, c. 37, extends to future taxes, but, of course, a subsequent Act of 27 Geo. 3 may affect or repeal the exemption. Did the Act of 27 Geo. 3 intend to repeal the 7 Geo. 3 which exempted these lands? This argument of the judgment would have been idle if Lord Kenyon had not been starting with the assumption that the 7 Geo. 3 did speak as to future taxes, for if it did not, what was there in it to repeal? There is another point in the judgment, and it is upon that point that I think, with very great respect, that a subsequent decision went astray. That point is that land tax was a subsisting

(1) 8 T. R. 468. (2) 4 T. R. 2.

tax in 1768, and that although it was imposed annually by an annual Act, the land tax of 27 Geo. 3 was a continued imposition of a like tax to that which existed as an imposition in 1768. But this consideration is quite beside the fact that the argument of the judgment is such as I have stated.

The second case is *Eddington* v. *Borman*. (1) It followed (and upon the same day) the decision in *Williams* v. *Pritchard*. (2) In substance, Lord Kenyon is saying this is an easier case than the last, for the parties rateable are those who are liable to be rated towards the relief of the poor, such rates to be ascertained by the rates at which the lands shall be assessed towards the land tax; the poor rate has existed since Elizabeth's time, and the point as to annual Act which arose as to land tax is out of the way.

The third case is *Rex* v. *London Gas Light and Coke Co.* (3) The rate in question was poor rate. Lord Tenterden's judgment adds nothing upon the question in review, but that of Bayley J. does. He says: "The exemption may be considered analogous to a covenant to pay taxes which applies to old taxes or others substituted for them, and not to taxes entirely new, unless there are express words to give it such extensive operation." This observation was quite beside the mark as regards the point before the Court for decision, and was, in fact, only a reason which Bayley J. had found, or thought he had found, for supporting the decision in *Perchard* v. *Heywood* (4) as to window tax. It was not a decision, but a dictum, and I may add that I very respectfully differ from it.

Matters so remained until the year 1899. In that year the respondents assessed one of the hereditaments to which the exemption of 1767 extended to a consolidated rate made by them under the City of London Sewers Act, 1848. An appeal was brought against the rate so assessed. The case was decided in the year 1900, under the name of *Sion College* v. *London Corporation*. (5) The decision was in 1901 affirmed in the Court of Appeal. (6) The question was whether s. 169 of the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), had repealed, by implication, the exemption in the 7 Geo. 3, c. 37. I refer only, in passing, to the

(1) 4 T. R. 4.
(2) 4 T. R. 2.
(3) 8 B. & C. 54.
(4) 8 T. R. 468.
(5) [1900] 2 Q. B. 581.
(6) [1901] 1 K. B. 617, 621.

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judgment of Channell J. for the purpose of saying that he plainly recognized that, at any rate within limits, the exemption in the 7 Geo. 3, c. 37, was from future obligations. The decision, indeed, in the Divisional Court was put upon the ground that the exemption in the Act of 7 Geo. 3 was repealed by implication by a subsequent Act. The result, however, in the Court of Appeal was to decide that the exemption applied only to taxes and assessments existing in 1767, or others substituted for them. For my purpose it is not necessary to state more of the matters decided. Sir A. L. Smith M.R., in giving judgment, said: "The result of the decisions in *Williams* v. *Pritchard* (1), *Perchard* v. *Heywood* (2), and *Rex* v. *London Gas Light and Coke Co.* (3) is that the Act only created an exemption from taxes and assessments then in existence, and not from substantially new ones coming into existence at a later date." My Lords, I have given my reasons for the opinion which I hold, that that is not the result of the decisions to which the learned Master of the Rolls refers. In Lord Kenyon's judgments I cannot find that result: I find the contrary result. In Bayley J.'s dictum no doubt something to that effect is found, but not by way of decision. My Lords, with the utmost respect I cannot agree in the view taken in the Court of Appeal in *Sion College* v. *London Corporation.* (4) I think that case was wrongly decided, in so far as it was there held that the exemption applied only to taxes and assessments existing in 1767, and others substituted for them.

In *London Corporation* v. *Associated Newspapers* (5) the provisions of the Act of 7 Geo. 3 were under discussion in your Lordships' House. The decision there was that, the rates then in question being leviable upon the basis of the annual value of the "hereditaments rateable to the relief of the poor," the reclaimed lands were exempt from them by reason of the fact that those lands were not rateable to the relief of the poor, and as a further ground by some of your Lordships that the poor rate was one indivisible rate, and that a rate is one thing and the purposes to which the proceeds are to be applied is another. The question, therefore,

(1) 4 T. R. 2.
(2) 8 T. R. 468.
(3) 8 B. & C. 54.
(4) [1901] 1 K. B. 617, 621.
(5) [1915] A. C. 674.

whether the exemption in the 7 Geo. 3, c. 37, was confined to rates existing in 1767 or extended to future rates did not arise, and three of your Lordships expressed yourselves as reserving your opinion upon it. It now becomes necessary to express an opinion, and I venture to express my own to be that the exemption extends to all present and future taxes and assessments, subject, of course, to the question whether by a subsequent statute that exemption has been qualified or repealed.

My Lords, this leads me to the next question. The rate here in dispute is the general rate made under s. 15 of the City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.). This is a rate to be made as one rate under the name of the general rate, and to include the sewer rate, consolidated rate, and police rate, and the trophy tax. It is to be made and collected as if it were the consolidated rate presently mentioned, and enactments relating to the consolidated rate are to be construed as applying to the general rate. The consolidated rate owed its existence to the City of London Sewers Act, 1848. The question upon this part of the case is whether s. 169 of the Sewers Act, 1848, expressly or by implication repeals or affects the exemption given by s. 51 of the 7 Geo. 3, c. 37. This turns upon the meaning of the words " or otherwise " in s. 169 of the Sewers Act. That section provides that the consolidated rate shall be made "upon every person who shall inhabit, hold, occupy, possess, or enjoy any house or building, whether such person shall be liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place, *or otherwise*. . . . . " The words " or otherwise " in a like context are found in s. 173. At the date when the Sewers Act was passed, in 1848, there was in operation a Police Act of 1839 (2 & 3 Vict. c. xciv.), which contained in s. 58 the identical words, except for the omission of " or otherwise." This is said to emphasize that which I should have admitted without any added emphasis, that in the Sewers Act, 1848, the words " or otherwise " must have been inserted with a meaning. I apprehend that every word in a statute must be taken to have been inserted with a meaning, difficult though it may be in some cases to maintain that frame of mind. I have only

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to see what the meaning is. To understand the words for the present purpose it is, I think, essential to bear in mind the difference between not being assessable to the relief of the poor and not being assessable at all. Let me suppose that a person disputed his liability under s. 169, and set up, by way of defence, that he was not assessable to the relief of the poor by reason of extra-parochiality or otherwise. He would be confronted with the words of the statute, and his defence would fail. But the defence of the present appellants would be not that they were not assessable to the relief of the poor (although that would be true), but that they were not assessable at all. To confront them with the statute would not defeat them at all. This is the view which Lord Davey took in *London Corporation* v. *Netherlands Steamboat Co.* (1) upon the operation of s. 169 upon s. 5 of the statute 52 Geo. 3, c. 49.

This view is supported by looking at s. 173 of the Sewers Act, 1848. That section provides for a valuation to be made by the Commissioners in certain events, including the event, whatever it be, covered by the words " or otherwise," but the acts they may do are not so expressed as to cover a case in which the event contemplated by " or otherwise " extends beyond some case ejusdem generis with the other events previously named, namely, unfair criterion or extra-parochiality. In my judgment the language of s. 169 is not such as to repeal by implication the express statutory exemption given by the 7 Geo. 3, c. 37.

My Lords, for these reasons I am of opinion that the exemption in the 7 Geo. 3, c. 37, extends to future taxes and assessments ; that s. 169 of the Sewers Act, 1848, has not repealed or affected that exemption ; and that the appellants are not rateable in respect of the rates here in question.

This being so, it is unnecessary for me to go further and consider whether the rates in question, or any of them, are old rates, as being substantially the successors of rates existing in 1767, or new rates imposed since that time, or to consider any question whether the general rate is " one and indivisible " within the previous decision in this House.

I think the appeal must be allowed with costs, and the respondents ordered to pay the costs of the special case and the costs in the

(1) [1906] A. C. 263, 271.

Divisional Court and in the Court of Appeal so far as relates to the matters the subject of the present appeal.

Orders of the Court of Appeal reversed and order of the King's Bench Division restored except so far as it was thereby adjudged that the appellants were liable to pay such sums as were assessed (1.) *in respect of expenses of paving, cleansing, lighting, improvements and sanitary charges other than those of sewerage and drainage,* (2.) *in respect of expenses under the City of London (Central Criminal Court House) Act,* 1904, *and* (3.) *in respect of other expenses of the Common Council not payable out of the poor rate: the respondents to pay the costs in the Courts below, including the costs of the special case, and also the costs of the appeal to this House.*

Lords' Journals, July 27, 1916.

Solicitors for appellants: *Rollit, Sons & Compston.*

Solicitor for respondents: *Sir Homewood Crawford, the City Solicitor.*

[HOUSE OF LORDS.]

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ATTORNEY-GENERAL FOR IRELAND (on behalf of His Majesty) . . . . . } Appellant;

AND

PROBY and Others . . . . . Respondents.

Sale of Land under Irish Land Purchase Acts—Superior Interest—Redemption—Crown Reversion expectant on Determination of an Estate in Tail Male—Jurisdiction of the Irish Land Commission to fix Price of Redemption without the Consent of the Crown—Land Law (Ireland) Act, 1896 (59 & 60 *Vict. c.* 47), *s.* 31—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 98, *sub-s.* 2.

Land in which the Crown was entitled to a reversion expectant on the determination of an estate in tail male was sold under the provisions of the Irish Land Purchase Acts in the Court of the Irish Land Commission :—

Held, upon the construction of s. 31 of the Land Law (Ireland) Act, 1896, as amended by s. 98, sub-s. 2, of the Irish Land Act, 1903, that the Land Commission had jurisdiction to determine, without the consent of the Commissioners of Woods and Forests, the price (if any) to be paid for the redemption of the Crown reversion.

Decision of the Court of Appeal in Ireland affirmed.

Appeal from a decision of the Court of Appeal in Ireland affirming a decision of the King's Bench Division in an information instituted by the Attorney-General for Ireland on behalf of His Majesty.

The question raised by this appeal was whether, upon the sale under the Irish Land Purchase Acts in the Court of the Irish Land Commission of lands in which the Crown was entitled to a reversion expectant on the determination of an estate in tail male, the Land Commission had jurisdiction to fix the price to be paid for the redemption of the reversion without the consent of the Commissioners of Woods and Forests, to whom the administration of the hereditary estates and revenues of His Majesty had been entrusted.

Sect. 31 of the Land Law (Ireland) Act, 1896, provides :—

Sub-s. 1 : "Where any land has been sold under the Land Purchase Acts, as amended by this Act, or where land is sold by the

* *Present :* Lord Parker of Waddington, Lord Sumner, and Lord Wrenbury.

Land Judge to the tenant thereof, and an advance under the Land Purchase Acts is made for the purpose of such sale, ... the sale of such land . . . . shall be made discharged from all superior interests as defined by this section, or from any of them, and in every such case the land shall be vested accordingly in the purchaser in fee simple, and such superior interests, or the value thereof, shall become a lien upon, and be redeemed or satisfied out of, the purchase money of such land."

Sub-s. 3: "The powers of apportionment and redemption given to the Land Commission by section ten of the Purchase of Land (Ireland) Act, 1885, and sections fifteen and sixteen of the Land Law (Ireland) Act, 1887, shall extend to superior interests and be exercised in such manner as shall appear equitable, and shall not be limited to an apportionment between the land sold and the residue of the land subject to the superior interest."

[By s. 15 of the Act of 1887 the Land Commission was empowered to apportion and to redeem Crown rents provided that no such apportionment or redemption should be made without the previous consent of the Commissioners of Woods and Forests.]

Sub-s. 4: "Where a holding is sold by the Land Judge to the tenant thereof, and an advance under the Land Purchase Acts is made for the purpose, the Land Judge shall have the powers of apportionment and redemption conferred on the Land Commission by sections fifteen and sixteen of the Land Law (Ireland) Act, 1887, and by section twenty of the Purchase of Land (Ireland) Act, 1891, as the same are amended and extended by this Act in like manner as if the Land Judge were the Land Commission."

Sub-s. 5: "The price or compensation to be paid in respect of a superior interest, or of any apportioned part thereof, shall be determined in the manner provided by the said sections for the redemption of annuities, rentcharges, and rents: Provided that, if the Court are of opinion that any such superior interest is of no appreciable value to the persons entitled thereto, the purchase money of the land may be distributed without regard to such superior interest."

Sub-s. 8 provides that the expression "superior interest," where land is held under a lease for lives or years renewable for ever, or for a term of years of which not less than sixty are unexpired at the date of the sale, "shall include any reversion or estate expectant

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on the determination of such lease or expiration of such term, and notwithstanding that such reversion or estate may be vested in Her Majesty and Her successors."

Sect. 98, sub-s. 2, of the Irish Land Act, 1903, provides: "The expression 'superior interest,' in the Land Purchase Acts, shall include any reversion or estate expectant on the determination of an estate tail or a base fee, whether such reversion or estate is or is not vested in the Crown."

By Royal letters patent dated October 23, 1537, King Henry VIII. granted to Peter Butler, Earl of Ormond and Ossory, and James Butler, Lord Butler, certain lands in Ireland, including the manor or reputed manor of Arcloo in the county of Wicklow (hereinafter called the Arklow estate), to hold the same to the said Peter and James and the longest liver of them and the heirs male of the body of the said Peter Butler lawfully begotten for ever, to be held of His Majesty, his heirs and successors, by service of one knight's fee. In the events which happened the Arklow estate became vested in 1872 in William the fifth Earl of Carysfort for life, with remainder to the respondent Douglas James Proby in tail male.

In 1904, 1905, and 1906 the said Earl of Carysfort instituted proceedings in the Court of the Irish Land Commission for the sale of different portions of the Arklow estate. These sales were duly prosecuted, and 1 per cent. was retained out of the purchase-moneys to meet the claim of the Crown for the redemption of the reversion in the said lands, that rate having been authorized by the Lords of the Treasury as the rate of purchase proper to be accepted by the Commissioners of Woods and Forests for the redemption of the reversion of the Crown in such cases.

On September 4, 1909, the Earl of Carysfort died, and thereupon the respondent Proby became entitled to the possession or receipt of the rents and profits of the said lands, or to the income of the proceeds of the sale of so much of the lands as had been sold, as tenant in tail male.

By a disentailing assurance dated December 21, 1909, the respondent Proby barred the estate in tail male in the lands remaining unsold and the moneys arising from the sales of such of the lands as had been sold, and by an indenture of resettlement dated August 11, 1911, he conveyed and assured the said lands and moneys to the

remaining respondents, who were appointed trustees of the indenture for the purposes of the Settled Land Acts.

Upon an application by the respondent Proby to the Irish Land Commission that the reversion claimed by the Crown in respect of the lands in question should be redeemed and the redemption price fixed, Wylie J., on June 24, 1913, ordered the redemption of the reversion and determined the redemption price at 1*l.* per cent. on the purchase-moneys.

The respondent Proby appealed against this order, and there was a cross-appeal by the Commissioners of Woods and Forests in so far as the order in effect declared that the price of the reversion could be determined by the Judicial Commissioner without their previous consent.

The Court of Appeal (O'Brien L.C., Holmes and Cherry L.JJ.), on December 1, 1913, after premising that the Court was of opinion that the reversion was of no appreciable value to the Crown and that the purchase-money might be distributed without regard to such reversion, discharged so much of the order as was appealed against by the respondent Proby and affirmed the order in all other respects, and the Court remitted the matters to the learned judge to proceed therein in conformity with the declaration aforesaid (*In re Earl of Carysfort's Estate* (1)); and on January 15, 1914, Wylie J. made an order for the distribution of the purchase-moneys accordingly.

On April 27, 1914, the Attorney-General for Ireland filed the present information claiming (1.) a declaration that the Court of the Irish Land Commission had no statutory or other jurisdiction to fix the price of the said reversion save with the consent of the Commissioners of Woods and Forests; (2.) a declaration that the claims of His Majesty the King as owner in right of his Crown to the said reversion were transferred to the purchase-moneys advanced by the Land Commission or otherwise brought to credit in the said purchase matters, and that the said claims were existing liens upon, and as such liable to be discharged out of, the purchase-moneys received by the defendants (the respondents); (3.) repayment by the defendants of the sums which had been retained to meet the claims of the Crown, and which had been subsequently paid to the

(1) [1914] 1 I. R. 96.

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defendants in accordance with the rulings of Wylie J., with interest from the date of payment.

The respondents by their answer alleged that the decision of the Court of Appeal on any appeal from a decision of the Land Commission was final and binding on all parties and that the informant was estopped by the judgment of the Court of Appeal, and the rulings of Wylie J. consequent thereon, from claiming the relief sought; and alternatively they alleged that the Irish Land Commission were authorized to fix the redemption price and distribute the purchase-moneys as aforesaid.

The King's Bench Division (Kenny and Molony JJ.) dismissed the information, and this order was affirmed by the Court of Appeal (O'Brien L.C., Palles C.B., and Moriarty L.J.), the Court being of opinion that they were bound by their decision in *In re Earl of Carysfort's Estate.* (1)

Upon the appeal to this House the appellant in the course of the argument abandoned all claim to the repayment of the moneys paid to the respondents and asked only for the second declaration, and thereupon the respondents waived all questions of estoppel, so that the only question for the determination of the House was as to the jurisdiction of the Land Commission. The nature of the arguments sufficiently appears from the judgment of Lord Parker of Waddington.

1916. July 3, 4. The *Attorney-General for Ireland* (*J. H. M. Campbell, K.C.*) and *the Solicitor-General for Ireland* (*James O'Connor, K.C.*) (with them *M. G. Longfield*, of the Irish Bar), for the appellant.

Denis Henry, K.C., and *S. L. Brown, K.C.* (with them *Edward S. Murphy*) (all of the Irish Bar), for the respondents.

The House took time for consideration.

July 28. LORD PARKER OF WADDINGTON. My Lords, all pleas based upon res judicata or estoppel having been abandoned by the respondents, the only question for your Lordships' decision is the proper construction to be placed on s. 31 of the Land Law (Ireland)

(1) [1914] 1 I. R. 96.

Act, 1896, as amended by s. 98, sub-s. 2, of the Irish Land Act, 1903.

In considering this section it is necessary to bear in mind the state of the law when the Act of 1896 was passed. At that date purchases by tenants of their holdings were carried into effect either by conveyances from their landlords or by means of a vesting order made by the Land Commission. It was the policy of the Acts not only to encourage landlords to sell, but, when possible, to vest the land sold in the tenant for an estate in fee simple free from incumbrances. With the latter object certain ancillary powers were vested in the Commission. Thus, under s. 10 of the Purchase of Land (Ireland) Act, 1885, the Commission obtained the powers relating to Crown rent and quit rent and incumbrances and charges which had been conferred on the land judges by s. 68 of the Landed Estates Court (Ireland) Act, 1858 (21 & 22 Vict. c. 72). These powers included (1.) a power, with the consent of His Majesty's Commissioners of Woods, Forests, and Land Revenues, to apportion Crown rents; (2.) power to sell any land discharged from any Crown rents purchased with such consent as aforesaid, and to pay the purchase consideration out of the money arising by the sale; and (3.) power with the like consent to purchase any Crown reversion.

Again, by the 14th section of the Land Law (Ireland) Act, 1887, it was provided that the Land Commission might pay or cause to be paid into Court the whole of the purchase-money of the holding agreed to be sold, whether provided by way of advance to the tenant or by the tenant personally, and might by order declare that the claims of all persons interested in the land sold, as incumbrancers or otherwise, should attach to the purchase-money of such land in like manner as immediately before such sale they attached to the land, and should cease to be of any validity as against the land, and subject as therein mentioned should be discharged or redeemed out of the purchase-money; and that the Land Commission should determine the rights and priorities of the landlord and such other persons, and should distribute the purchase-money in accordance with such rights and priorities. This section is not, however, so conceived as to bind the Crown; and though the 15th section of the Act enables the Commission to apportion and redeem (inter alia) Crown rents or quit rents, no such apportionment

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or redemption is to be made without the consent of His Majesty's Commissioners of Woods, Forests, and Land Revenues. Annuities, rent-charges, and rents belonging to private persons can, under the 16th section, be apportioned by the Commission without any consent on the part of the persons entitled thereto. In the case of any such apportionment the part of the annuity, rent-charge, or rent apportioned on the holding is transferred by the section from the land to the purchase-money, and, whether there has been any apportionment or not, the Commission may order redemption of any such annuity, rent-charge, or rent out of the purchase-money. The amount of the redemption money is to be determined either (1.) by agreement, or (2.) by the Land Commission, if the parties so consent, or (3.) by arbitration.

Such being the state of the law when the Act of 1896 was passed, I proceed to direct your Lordships' attention to the provisions of the 31st section of the Act itself. Sub-s. 1 of this section provides that where land has been sold under the Land Purchase Acts, and an advance under those Acts is made for the purposes of the sale, the sale of such land shall be made discharged from all superior interests as defined by the section, and in every such case the land shall be vested accordingly in the purchaser, and such superior interests or the value thereof shall become a lien upon and be redeemed and satisfied out of the purchase-money. The definition of superior interest contained in sub-s. 8 includes any rent, rent-charge, annuity, fees, duties, or services payable or to be rendered in respect of the land sold to any person, including His Majesty and his successors, and any estates, exceptions, reservations, covenants, conditions, or agreements contained in any fee farm grant or other conveyance in fee or lease under which such land is held, and if such land is held under a lease for lives or years of which not less than sixty are unexpired at the date of the sale, it includes also any reversion or estate expectant on the determination of such lease, notwithstanding that such reversion or estate may be vested in His Majesty and his successors.

My Lords, it cannot be disputed that, having regard to the definition of superior interests contained in sub-s. 8, the provisions of sub-s. 1 bind the Crown, and without any consent on the part of the Crown operate, so far as the land sold is concerned, to extinguish

all superior interests within the definition to which the Crown may be entitled, giving the Crown in lieu thereof a lien on the purchase-money. But for sub-s. 3 it would be equally clear that no consent on the part of the Crown would be necessary to the subsequent redemption or satisfaction of the Crown's superior interests out of the purchase-money. But sub-s. 3 creates considerable difficulty. It is thereby provided that the powers of apportionment and redemption given to the Land Commission by s. 10 of the Act of 1885 and ss. 15 and 16 of the Act of 1887 shall extend to superior interests, and it is accordingly argued that, as these sections do not provide for apportionment or redemption of Crown interests otherwise than with the consent of His Majesty's Commissioners of Woods, Forests, and Land Revenues, such consent is in every case still necessary.

In other words, if the Crown is entitled to a rent payable out of an estate a small portion whereof is sold under the Acts, the Crown can, by refusing its consent to either apportionment or redemption, prevent for an indefinite period any distribution of the purchase-money. It is in my opinion almost impossible to suppose that this was the intention of the Legislature. So construed the section might, in cases where an estate was subject to a Crown rent, make a landlord less willing than before the Act to sell to a tenant. Before the Act, if the Crown withheld its consent, the sale could be made subject to the Crown interest, and the purchase-money would be immediately distributable; but after the Act, though the land would be sold free from the Crown interest, the distribution of the purchase-money might be indefinitely postponed, to the serious inconvenience and detriment of the vendor. In fact, sub-s. 3, construed in this way, appears to me to be inconsistent not only with the express provisions but also with the policy of sub-s. 1. Under these circumstances it appears to me more reasonable to suppose that the intention of sub-s. 3 was to facilitate the redemption and satisfaction contemplated by sub-s. 1 by enlarging the powers of the Land Commission in respect of apportionment and redemption so as to cover interests as to which under the prior Acts they had no such powers, and not to limit the operation of sub-s. 1 by reintroducing the necessity of some consent on the part of the Crown in the case of Crown interests. This construction is, in my

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opinion, borne out by the provisions of sub-s. 5, under the terms of which the price or compensation to be paid in respect of every superior interest, including those belonging to the Crown, is to be determined, not in manner provided by s. 10 of the Act of 1885 or s. 15 of the Act of 1887, but in manner provided by s. 16 of the latter Act; that is to say, either (1.) by agreement, or (2.) by the Land Commission, if the parties consent, or (3.) by arbitration, with a proviso that if the Court be of opinion that the superior interest is of no appreciable value the purchase-money may be distributed without regard thereto. These provisions are quite consistent with sub-s. 3, construed as I have last suggested, but, so far as the Crown is concerned, unintelligible if under sub-s. 3 the consent of the Crown to every apportionment or redemption is still necessary.

My Lords, s. 98, sub-s. 2, of the Act of 1903 provides that the expression "superior interest" in the earlier Act shall include any reversion or estate expectant on the determination of an estate tail or a base fee, whether such reversion or estate is or is not vested in the Crown. But the Act contains two other sections which appear to be material in considering the point your Lordships have to decide. The 62nd section provides that when any land sold under the Acts is subject with other lands to a superior interest the purchase-money may in certain cases be distributed without regard thereto. There is no provision requiring any consent in the case of superior interests vested in the Crown, and that the Crown is bound by the section is clear if only from the fact that a certain class of Crown interest is excepted from its operation. Again, s. 64 provides that, notwithstanding anything in s. 16, sub-s. 3, of the Act of 1887, if the parties do not within the prescribed time agree upon the redemption price of a superior interest, that price shall be determined by the Judicial Commissioner. There is nothing to exclude superior interests vested in the Crown from the operation of this section.

My Lords, I have for the foregoing reasons come to the conclusion, though not without some hesitation, that the construction placed in the Courts below on s. 31 of the Act of 1896 was right, and that the appeal fails and should be dismissed with costs. I move the House accordingly.

LORD SUMNER. My Lords, the definition of "superior interest" contained in the Land Law (Ireland) Act, 1896, s. 31, sub-s. 8, as extended by the Irish Land Act, 1903, s. 98, sub-s. 2, applies the imperative directions of the Land Law (Ireland) Act, 1896, s. 31, sub-s. 1, to the Crown reversion which is the subject of the present appeal. Those directions are that the sale of the land in question " shall be made discharged from " this Crown reversion, and that the value of this Crown reversion " shall become a lien upon and be redeemed . . . . out of the purchase money of such land." Further, by sub-s. 5, the compensation to be paid in respect of it has to be determined in a particular manner, which is to be ascertained by reference to the Land Law (Ireland) Act, 1887, s. 16, in the case of sales which, like the present, are made by the Land Commission, but subject to this proviso, that the Court has power to distribute the purchase-money without regard to the Crown reversion, where it is of opinion that the reversion is of no appreciable value.

My Lords, in effect the above-mentioned sub-s. 1 now contains the consent of the Sovereign given in advance and applicable to every case as it arises, in which it becomes necessary to redeem a Crown reversion in order that the directions of sub-s. 1 may be complied with, namely, to discharge the land and extinguish the burthens and complete the transaction by distributing the purchase-money.

This being so, I am of opinion that s. 15 of the Land Law (Ireland) Act, 1887, must be deemed to have been extended to a Crown reversion in such manner as to be not in conflict but in harmony with the provisions above stated of s. 31, sub-s. 1, of the Land Law (Ireland) Act, 1896. The prohibition against apportioning or redeeming Crown rents or quit rents without the consent of the Commissioners of Woods and Forests, which sub-s. 3 of the former section contained, cannot now stand against or control the statutory direction, enacted in 1896, to deal with a Crown reversion in the prescribed way, to which the Crown by statute consents. I do not think that the incorporation of the powers of apportionment and redemption in question can be read so as to require any fresh consent by the Commissioners of Woods and Forests to the redemption of a Crown reversion, seeing that by s. 31, sub-s. 1, of the Land Law (Ireland) Act, 1896, full consent has already been given by the Crown

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itself. The extension of the powers given by s. 15, sub-ss. 1 and 2, of the Act of 1887 to s. 31 of the Act of 1896 must be so effected as to reconcile them both and not so as to empower the Commissioners of Woods and Forests to withhold a consent to the particular transaction, which the Crown itself had been pleased antecedently to embody in the statute once and for all. I am therefore of opinion that the appeal should be dismissed.

LORD WRENBURY. My Lords, s. 98, sub-s. 2, of the Irish Land Act, 1903, makes a Crown reversion expectant upon an estate tail a "superior interest" within s. 31 of the Land Law (Ireland) Act, 1896. This being so, the question upon this appeal is whether the provisions of the Act of 1896 are such as that such a superior interest can be redeemed without the consent of the Crown.

Sect. 68 of the Landed Estates Court Act, 1858, empowered the Court, with the consent of the Crown, to apportion a Crown rent and to purchase, with the consent of the Crown, any estate or interest of the Crown in remainder or reversion.

Sect. 10 of the Purchase of Land (Ireland) Act, 1885, incorporated s. 68 of the Act of 1858, and rendered it applicable to the case of a holding sold by the Land Commission to a tenant.

Sect. 15 of the Land Law (Ireland) Act, 1887, dealt with the case of lands sold which were subject, with other lands, to any Crown rent, quit rent, or tithe rent-charge. It gave the Land Commission (sub-s. 1) power to apportion these between the land sold and the other lands subject to them, and (sub-s. 2) to order their redemption at a price to be fixed by the Land Commission. But (sub-s. 3) no such apportionment or redemption was to be made without the consent of the Crown.

Sect. 16 of the same Act dealt with the like case when the interest was not a Crown rent, quit rent, or tithe rent-charge, but was an annuity or rent-charge of a private owner. Sub-s. 3 provided that the price was to be a price to be fixed by agreement between the parties or to be determined by the Land Commission if the parties consented that the Land Commission should determine it, or, if they did not consent, then to be settled by arbitration. This was altered by s. 64 of the Act of 1903, which provides that if the parties

do not agree the price is to be determined by the Judicial Commissioner or the Land Judge.

Under these circumstances the Land Law (Ireland) Act, 1896, was passed. The question is as to the effect of s. 31 of that Act, reading sub-s. 8, which defines superior interests, as a section amended in manner provided by s. 98, sub-s. 2, of the Act of 1903.

From the fact that the Crown is expressly named in s. 31, sub-s. 8, of the Act of 1896 and in s. 98, sub-s. 2, of the Act of 1903, it results that the Crown is bound by the whole of s. 31 of the Act of 1896 as regards "superior interests," whether being such as defined by s. 31, sub-s. 8, of the Act of 1896 or by s. 98, sub-s. 2, of the Act of 1903. It is therefore bound by s. 31, sub-s. 1. That clause provides that the sale "shall be made discharged from all superior interests . . . . and such superior interests, or the value thereof, shall become a lien upon, or be redeemed or satisfied out of, the purchase money." These are plain words, and in these there is no reservation in favour of the Crown of any veto against effect being given to them without the consent of the Crown. The difficulty arises upon s. 31, sub-s. 3. The greater part of that clause has to do with apportionment. It provides that the power of apportionment found in the earlier Acts "shall extend to superior interests," thus enlarging the subject-matter to which they are to apply, and that they shall not be limited to apportionment between the land sold and the residue of the land subject to the superior interest, meaning, I suppose, but not saying, that when charged only upon the land sold they may be apportioned upon different parcels of that land. The clause, however, contains also the words "and redemption," with the result that the powers of redemption in the previous Acts are also extended to superior interests. Are they extended with or without the fetter imposed by the earlier Acts requiring the consent of the Crown? If they are extended with the fetter requiring the consent of the Crown, then I cannot escape the conclusion that sub-s. 3 is in conflict with sub-s. 1. For the result will be that sub-s. 1 enacts that the sale shall be made discharged from the superior interest, while sub-s. 3, if consent is still required, enacts that the sale shall not be made discharged from it if the Crown refuses its consent.

Looking on to sub-s. 5, I find that the price is to be determined

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in manner provided for the redemption of annuities, rent-charges, and rents. This sends me to s. 16 of the Act of 1887, as altered by s. 64 of the Act of 1903. There is in sub-s. 5, further, a proviso that if the Court finds the superior interest to be of no appreciable value the purchase-money may be distributed without regard to it.

In these provisions it seems to me to be assumed that the veto of the Crown is gone; that the superior interest is to be discharged under sub-s. 1, and that sub-s. 3 is not intended to do more than introduce by reference sub-ss. 1 and 2 of s. 15 of the Act of 1887, dropping the restrictive provision introduced by the incorporation of s. 68 of the Act of 1858 into s. 10 of the Act of 1885, and dropping the restrictive provision of sub-s. 3 of s. 15 of the Act of 1887.

In other words, I think that sub-s. 1 of s. 31 of the Act of 1896 must prevail.

There was another point as to estoppel, but the parties being desirous of a decision upon the point above dealt with have declined to raise it. I say nothing about it.

My Lords, for the reasons which I have given, I think that this appeal fails and should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 28, 1916.

Solicitor for appellant: *Denham Westmacott, for Sir William Fry, Dublin.*

Solicitors for respondents: *Walter Sedgwick, for Frere, Cholmeley & Co., London, and H. & W. Stanley, Dublin.*

[HOUSE OF LORDS.]

JONES . . . . . APPELLANT;

AND

JONES AND ANOTHER . . . . . RESPONDENTS.

H. L. (E.)*
1916
July 28.

Slander—Cause of Action—Words imputing Moral Misconduct—Schoolmaster—Absence of Special Damage—Words not spoken of Plaintiff in Relation to his Calling.

An action of slander will not lie for words imputing adultery to a schoolmaster, in the absence of proof of special damage, unless the words are spoken of him touching or in the way of his calling.

Ayre v. *Craven* (1834) 2 Ad. & E. 2 applied.

Dictum of Bayley B. in *Lumby* v. *Allday* (1831) 1 Cr. & J. 301, 305, explained.

Decision of the Court of Appeal [1916] 1 K. B. 351 affirmed.

APPEAL from an order of the Court of Appeal (1) setting aside a verdict and judgment in favour of the plaintiff in an action of slander tried before Lush J. and a common jury and ordering judgment to be entered for the defendants.

The plaintiff (the appellant) was a certificated teacher and was headmaster of the Llidiardau Council School, Rhoshirwaen, Pwllheli, in the county of Carnarvon. The slander complained of was that one day in May, 1914, the female defendant, who was the wife of the male defendant (they being the respondents), falsely and maliciously spoke and published of and concerning the plaintiff in relation to his profession as certificated teacher and in relation to his office as headmaster of the said school words imputing that the plaintiff had been guilty of adultery with one Mrs. Roberts, a married woman, who was employed by the cleaner of the school.

The defendants by their defence said that the alleged words, if spoken (which was denied), did not relate to the plaintiff in his profession as certificated teacher, nor to him in his office as headmaster, and that such words were not actionable without proof of special damage, and none was alleged.

* *Present:* VISCOUNT HALDANE, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

(1) [1916] 1 K. B. 351.

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The action was tried at the Carnarvon Assizes. At the trial Elizabeth Jones, one of the persons to whom the words complained of were spoken, was called as a witness, and in cross-examination she stated that the words were not spoken at all in reference to the plaintiff as schoolmaster. Before the plaintiff's case was closed his counsel proposed to call the secretary to the education committee which had control of the elementary schools in Carnarvonshire to prove that the slander in question would tend to lose the plaintiff his employment. Lush J. asked if that was not obvious, and thereupon counsel for the defendants made the admission that the plaintiff would suffer to the same extent and no more than a man following any other occupation, and that a man who was a schoolmaster would probably be dismissed from his employment if he were leading an immoral life just as a man following any other occupation would be. The exact language of this admission will be found in the judgment of Lord Sumner.

The defendants adduced no evidence.

The questions left by the learned judge to the jury, with their answers thereto, were as follows :—

(1.) Were words spoken by the defendants of the plaintiff imputing immoral misconduct between plaintiff and Mrs. Ellen Roberts ?—Yes.

(2.) Were they spoken of him in the way of his calling, i.e., in such a way as to imperil the retention of his office ?—Yes.

(3.) Did they impute that he was unfit to hold his office ?—Yes.

And the jury fixed the damages at 10*l.*

The learned judge adjourned the case for further argument in London, and in the course of that argument counsel for the defendants again admitted that the county council would naturally not allow a master who was carrying on an immoral intercourse to stop in the school and teach children, but stated that this admission would be equally true of any other person occupying a public position. After hearing arguments on the law Lush J. entered judgment for the plaintiff in accordance with the verdict of the jury.

The Court of Appeal (Swinfen Eady L.J., Warrington L.J., and Bray J.) set aside this judgment on the ground that words imputing adultery or immoral conduct, even when spoken of a man holding an office or carrying on a profession or business, were not actionable without special damage unless the words related to his conduct in

the office, profession, or business, or the imputation was connected with his professional duties, except in the case of a clergyman holding clerical preferment or employment, and that the imputation upon the plaintiff was not connected with his occupation or employment.

1916. May 29, 30; June 1. *Sir Robert Finlay, K.C.*, and *Mortimer Montgomery, K.C.* (with them *T. E. Morris* and *Arthur A. Thomas*), for the appellant. The jury have found that the slander was spoken of the appellant in the way of his calling, and if there is any evidence fit to go to the jury, that is a question for them to decide. The cases in which an action for slander will lie without proof of special damage fall into three categories: (1.) where the words impute to the plaintiff a criminal offence; (2.) where they impute to him that he is suffering from a contagious disease such as would exclude him from society; (3.) where the words are spoken of the plaintiff in the way of his calling or office or tend to damage him in his calling or office. The true principle is that laid down by Bayley B. in delivering the judgment of the Court of Exchequer in *Lumby* v. *Allday* (1), namely, that the words must impute the want of some general requisite, such as honesty, capacity, fidelity, &c., or must connect the imputation with the plaintiff's office, trade, or business. The words must impute to the plaintiff some special unfitness in relation to his calling or the want of some general quality which must necessarily affect him in his calling. In the case of a schoolmaster a charge that he is carrying on an immoral intercourse with a married woman, if substantiated, must necessarily affect him in his calling. Apart from the Slander of Women Act, 1891, to say that a young woman was unchaste was not actionable in the absence of special damage, but the contrary has been held in the case of a governess or domestic servant: *Quinn* v. *Wilson* (2); *Connors* v. *Justice* (3); and see *Rumsey* v. *Webb*. (4) The profession of a schoolmaster involves training his pupils in sound moral principle as much as in reading and writing, and if an imputation of adultery is made against him that is an imputation in the way of his profession, because it imputes

(1) 1 Cr. & J. 301, 305.
(2) (1850) 13 Ir. L. R. 381.
(3) (1862) 13 Ir. C. L. R. 451.
(4) (1842) 11 L. J. (C.P.) 129.

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to him a want of morality, without which no man ought to be entrusted with the office of a schoolmaster. It is an imputation of the want of a general requisite for the office of a schoolmaster. It is not necessary that the words should be said of him in his profession or business; it is enough that the words are such as are calculated to damage him in his profession or business. The putting forward of any charge which if established would justify the plaintiff's dismissal from his office is actionable without special damage. The law was correctly applied by Lush J. *Best* v. *Loit* (1) shows that the words need not be spoken of the plaintiff in the way of his profession if they would disgrace him in his profession. The common law on this matter is to some extent inadequate and inconsistent, but it is not so wholly unreasonable as it would be if the view of the Court of Appeal were upheld. *Ayre* v. *Craven* (2), where a verbal charge of criminal conversation against a medical man was held not actionable per se, really proceeded upon a point of pleading, but so far as it went upon any general principle it was wrongly decided. It is doubted by Alderson B. in *Gallwey* v. *Marshall* (3) and by Parke B. in *Jones* v. *Littler* (4), though it was followed in *James* v. *Brook.* (5) *Parrat* v. *Carpenter* (6), where a verbal charge of adultery against a beneficed clergyman was held not actionable per se, is overruled by *Dod* v. *Robinson* (7), as is stated by Parke B. and Pollock C.B. in *Gallwey* v. *Marshall* (3), and is no longer law. In *Wharton* v. *Brook* (8) Twisden J. said that a charge of unchastity against a schoolmistress was not actionable without special damage, but that dictum cannot now be supported. A good reputation for morality is essential to the profession of a certificated teacher. *Hopwood* v. *Thorn* (9), which decided that a charge against a Methodist minister who was formerly a linen-draper that he was a dishonest draper was not maintainable, was also wrongly decided. *Coxeter* v. *Parsons* (10) went on a question of jurisdiction. *Gallwey* v. *Marshall* (3) decided that no action would lie for a verbal imputation of incontinence in a clergyman unless he held some clerical office

(1) (1637) 1 Roll. Abr. 59 (case 6).
(2) 2 Ad. & E. 2.
(3) (1853) 9 Ex. 294.
(4) (1841) 7 M. & W. 423; 10 L. J. (Ex.) 171.
(5) (1846) 9 Q. B. 7.
(6) (1597) Cro. Eliz. 502.
(7) (1647) Aleyn, 63.
(8) (1669) 1 Vent. 21.
(9) (1849) 8 C. B. 293.
(10) (1698) 1 Ld. Raym. 423.

or employment of temporal profit. Whether that decision is right or wrong, it is not opposed to the appellant's argument. In *Payne* v. *Beuwmorris* (1) words imputing to a chaplain that he had an illegitimate son were held actionable per se, and for this purpose the case of a chaplain or beneficed clergyman is identical with the case of a certificated teacher. It is settled that a verbal imputation upon the credit of a tradesman is actionable without special damage though not spoken of him in the way of his trade, since it must necessarily damage him in his trade : *Stanton* v. *Smith* (2), approved in *Jones* v. *Littler*. (3) On the other hand, a verbal imputation against a solicitor of defrauding his creditors has been held not to be actionable per se : *Doyley* v. *Roberts*. (4) So also an imputation of insolvency : *Dauncey* v. *Holloway*. (5) But it is startling to be told that an imputation of fraud or insolvency would not injure a solicitor in his profession. *Doyley* v. *Roberts* (4) is, however, distinguishable from the present case, because there the jury found that the words were not spoken of the plaintiff as attorney ; in *Dauncey* v. *Holloway* (5) the question was withdrawn from the jury. In *Wood* v. *Barnett* (6) an action of slander for an imputation of drunkenness against a headmaster failed, but the charge was a stale one, and the jury found that the charge would not lead to the plaintiff's dismissal though it might damage his future career. So an action of slander for a charge of want of sincerity against a member of Parliament has been held not to be maintainable : *Onslow* v. *Horne* (7) ; but the case might be different now that members receive a salary. De Grey C.J., delivering the judgment of the Court of King's Bench, there states the general principle to be that words are actionable if they " may be of probable ill consequence to a person in a trade, a profession, or an office." It being here beyond question that the particular imputation damages the plaintiff in his profession, the law does not withhold a remedy.

[VISCOUNT HALDANE. In *Miller* v. *David* (8) Lord Coleridge, delivering the judgment of the Court, says that the rule laid down by

(1) (1668) 1 Lev. 248.
(2) (1727) 2 Ld. Raym. 1480.
(3) 7 M. & W. 423.
(4) (1837) 3 Bing. N. C. 835.
(5) [1901] 2 K. B. 441.
(6) *The Times*, May 5, 1913.
(7) (1771) 2 W. Bl. 750, 753.
(8) (1874) L. R. 9 C. P. 118, 125.

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De Grey C.J. is expressly disapproved of by the Court of Exchequer in *Lumby* v. *Allday*. (1)]

In *Miller* v. *David* (2) it is manifest that the words were not defamatory and were not spoken of the man in his trade. In *Alexander* v. *Jenkins* (3) Lord Herschell, in dealing with an imputation of the want of some general requisite, proceeded on the distinction between an office of profit and an office of credit and honour, and held that in the latter case a mere general imputation of the want of some general quality was not per se actionable. In several early cases words imputing the want of some general requisite for a trade or profession have been held actionable per se: *Taylor* v. *Perr* (4); *Blunden* v. *Eustace* (5); *Cawdry* v. *Highley* (6); *Seaman* v. *Bigg* (7); *Read* v. *Hudson*. (8)

The cardinal defect of the judgment of the Court of Appeal is that it treats the case of a charge of insolvency against a tradesman, of which the last cited case is an example, as one of an exceptional character, whereas it is in fact an illustration of the general principle laid down by Bayley B. that words imputing the want of some general quality the possession of which is essential to success in the calling of the plaintiff are per se actionable.

Greer, *K.C.* (with him *T. Artemus Jones* and *Clement Davies*), for the respondents.

[VISCOUNT HALDANE. We wish to hear you on the question whether the second and third questions should have been submitted to the jury at all.]

As to those questions there was no evidence fit to go to the jury. The admission of the respondents' counsel carried the matter no further. There is no decided case, except in the case of the insolvency of a trader, where a statement of a want of a general requisite has been held a sufficient foundation for an action of slander unless the words are spoken in relation to the plaintiff's particular calling. The authorities are all consistent with the view that a verbal imputation on the plaintiff's moral character not connected by the speaker

(1) 1 Cr. & J. 305.
(2 L. R. 9 C. P. 118.
(3) [1892] 1 Q. B. 797.
(4) (1616) 1 Roll. Abr. 44 (case 5), 55 (case 21).
(5) (1618) Cro. Jac. 504 (case 15).
(6) (1633) Cro. Car. 270 (case 5); sub nom. *Cawdrey* v. *Chickley*, 1 Roll. Abr. 54 (case 11).
(7) (1637) Cro. Car. 480 (case 3)
(8) (1700) 1 Ld. Raym. 610.

expressly or by implication with the plaintiff's business or profession is not actionable in the absence of proof of special damage. That is true not only of sexual immorality but of dishonesty. Bayley B.'s dictum has been misunderstood. *Hartley* v. *Herring* (1), where immorality was imputed to a dissenting minister, went upon the question whether special damage was alleged with sufficient certainty, but upon the appellant's contention that question would have been irrelevant. *Stanton* v. *Smith* (2) is one of those exceptional cases as to insolvency, but if insolvency is imputed to a trader, that necessarily refers to insolvency in his trade. In *Jones* v. *Littler* (3) Parke B. shows the ratio decidendi of the insolvency cases. In *Brayne* v. *Cooper* (4) an allegation that a staymaker made his living by the proceeds of prostitution was held not actionable. *Smedly* v. *Heath* (5) shows that an allegation of dishonesty against a tradesman does not give a cause of action unless spoken in relation to his trade. So in *Hopwood* v. *Thorn* (6) it was held that an allegation of dishonesty against a clergyman was not actionable unless the speaker connected the dishonesty with the plaintiff's profession. This case is governed by the principle of *Ayre* v. *Craven* (7), which was followed in *Dixon* v. *Smith*. (8)

[He was stopped.]

Sir Robert Finlay, K.C., in reply. The respondents' proposition is displaced by Parke B. in *Jones* v. *Littler* (3) and by *Drake* v. *Hill* (9), *Stanton* v. *Smith* (2), *Cawdry* v. *Highley* (10), and *Best* v. *Loit.* (11) " Whether the words were spoken of the plaintiff in the way of his office, profession, or trade, is a question for the jury " : Odgers on Libel and Slander, 5th ed., p. 685 ; and this question was left to the jury in *Jones* v. *Littler* (3) and in *Doyley* v. *Roberts*. (12)

The House took time for consideration.

July 28. VISCOUNT HALDANE. (13) My Lords, the question in this appeal is whether the appellant, who was plaintiff in the action,

(1) (1799) 8 T. R. 130.
(2) 2 Ld. Raym. 1480.
(3) 7 M. & W. 423.
(4) (1839) 5 M. & W. 249.
(5) (1668) 1 Lev. 250.
(6) 8 C. B. 293.
(7) 2 Ad. & E. 2.
(8) (1860) 5 H. & N. 450.
(9) (1669) Sir T. Raym. 184.
(10) Cro. Car. 270 (case 5).
(11) Roll. Abr. 59 (case 6).
(12) 3 Bing. N. C. 835.
(13) Read by Lord Wrenbury.

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can recover general damages for an untrue verbal imputation of immoral conduct with a married woman. He is a certificated teacher and is the senior master of a council school in Wales. It is not in dispute that the imputation of such conduct, if believed, would be seriously prejudicial to a person in his position, and might lead to the loss of an appointment which, concerned as it is with the teaching of the young, implies in the person who holds it freedom from reproach of this kind. At the same time it must be remembered that the position of a certificated teacher is not unique in this respect, for there are many other appointments that are held on a similar condition, express or implied.

The school in which the appellant was employed was looked after by his aunt, as caretaker, and she was in the habit of employing the husband of a Mrs. Ellen Roberts to do some of the cleaning. The respondent, Mrs. Jones, is found by the jury before which the action was tried to have spoken words imputing moral misconduct between the appellant and Mrs. Roberts. Mrs. Jones was the defendant in the action, and her husband was joined as being liable for his wife's tort. The jury found further, in response to questions from Lush J., who tried the case, that the words " were spoken of him in the way of his calling, that is, in such a way as to imperil the retention of his office," and further that " the words imputed that he was unfit to hold his office." It is, however, clear that there was no evidence that any words were used which referred to his office or his conduct in it, and the first part of the finding cannot be relied on as anything more than an inference. Nor was there any evidence of the use of words which could, by the terms used, bear out the second part of the finding. It was, moreover, not alleged that the appellant had been dismissed or otherwise pecuniarily injured in his calling, and indeed there was no evidence whatever of special damage. The jury, however, assessed general damages at 10*l*. Upon these findings Lush J. reserved the question of law, whether the appellant was entitled to judgment, and afterwards, having heard arguments, delivered a considered opinion, as the result of which, after examining the authorities, he decided for the appellant. In the course of the argument before him, counsel for the present respondents admitted that the local educational authority would naturally not allow a teacher to remain in the school and teach

children if he were carrying on an immoral intercourse. But he said that his admission was meant to have nothing in it distinctive of the office of a teacher, and that he admitted only what would apply equally in the case of other offices.

The Court of Appeal reversed the judgment of Lush J. and entered judgment for the respondents.

After examining the authorities, I have come to the conclusion that the Court of Appeal were right, and that the judgment of Lush J., notwithstanding the care which he had obviously bestowed on it, cannot be supported. He seems to have regarded the decided cases as having laid down a broad principle, which could be legitimately extended to a case like the present. My Lords, I think that is not so. The action for slander has been evolved by the Courts of common law in a fashion different from that which obtains elsewhere. As one of the consequences the scope of the remedy is in an unusual degree confined by exactness of precedent. It is not for reasons of mere timidity that the Courts have shown themselves indisposed to widen that scope, nor do I think your Lordships are free to regard the question in this case as one in which a clear principle may be freely extended. Lord Herschell, in his judgment in *Alexander* v. *Jenkins* (1), remarked of this very point that " when you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions to meet cases which fall within the same principle ; but where we are dealing with such an artificial law as this law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of cases in which it has not hitherto been held to lie, it is the Legislature that must make the extension and not the Court." There is a difference between slander and libel which has been established by the authorities, and which is not the less real and far-reaching because of the fact that it is explicable almost exclusively by the different histories of the remedies for two wrongs that are in other respects analogous in their characters. The greater importance and scope of the action for libel was mainly attributable to the appearance of the printing press. The Court of Star Chamber quickly took special cognizance of libel, regarding it not merely as a crime punishable as such, but as

(1) [1892] 1 Q. B. 797, 801.

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a wrong carrying the penalty of general damages. After the Star Chamber was abolished by the Long Parliament much of the jurisdiction which its decisions had established and developed in cases of libel survived, and was carried on by the Courts of common law to whom it passed.

The history of the action for slander is radically different. Slander never became punishable in the civil Courts as a crime. In early days the old local Courts took cognizance of it as giving rise to claims for compensation. When these Courts decayed, the entire jurisdiction in cases of defamation appears to have passed, not to the Courts of the King, but, at first at all events, to the Courts of the Church. However, after the Statute of Westminster the Second had enabled novel writs in consimili casu to be issued, the action on the case for spoken words began to appear as one which the Courts of the King might entertain. Subsequently to the Reformation, when the authority of the Courts of the Church received a heavy blow and began to wane, the Courts of the King commenced the full assertion of a jurisdiction in claims arising out of spoken defamation concurrent with that of the spiritual tribunals. As might have been expected of civil Courts, whose concern had been primarily with material rights and not with discipline as such, the new jurisdiction in claims based on slander appears to have been directed to the ascertainment of actual damage suffered and to a remedy limited to such damage. This explains the restricted character of the development of the remedy and the tendency to confine its scope by the assertion that actual damage was the gist of the action. The observations of Pollock C.B. in the course of his judgment in *Gallwey* v. *Marshall* (1) illustrate the importance of these considerations. The rule thus established was to some extent relaxed in its form by decisions which in certain nominate cases treated particular types of slander as so injurious by their very nature that the suffering of actual damage might be presumed and need not be proved. These exceptional types of slander comprised imputations of the commission of serious criminal offences, imputations of suffering from certain noxious diseases, and imputations of special forms of misconduct which would manifestly prejudice a man in his calling. But, as a general principle, as to the actionable character of

(1) 9 Ex. 294.

words spoken of a man to his disparagement in his calling the Courts, with an exception to which I will refer later, appear on the balance of authority to have laid down the limitation that the words must have been actually spoken of him "touching" or "in the way" of that calling. In *Lumby* v. *Allday* (1) Bayley B. said: "Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business." In speaking of the imputation of such a want of "general requisite" as actionable in itself I think that Bayley B. was referring to certain decisions which show that, in the case of a trader, the Courts construed language which might affect his credit to be presumed to be directed against his credit as a trader, although no express "colloquium" touching his trade had been proved. The Courts, who leaned specially to the protection of traders, appear to have made this presumption almost, if not quite, as matter of law for the security of commerce. But Bayley B. observed that the words must be such as to have "a natural" as distinguished from a merely probable tendency to damage the plaintiff's reputation in his calling. In *Jones* v. *Littler* (2) Parke B. laid down this exception to much the same effect. A brewer was alleged to have been locked up for debt. It was found that in the "colloquium" he had been referred to as a brewer. But Parke B. said that "even if" the words "were spoken of him in his private character, I think the case of *Stanton* v. *Smith* (3) is an authority to shew that the words would have been actionable, because they must necessarily affect him in his trade." The older case of *Reeve* v. *Holgate* (4) lays down the rule similarly. But it proceeds on the ground that the words themselves supply the "colloquium," for "they appear to be spoke of his trade." This readiness to make a presumption as regards language which might affect the credit of a trader of damage arising from words alleging insolvency, notwithstanding that the imputation is not in terms made about him in his capacity of trader, has not been extended to other callings. There is indeed at least one other illustration of such readiness disclosed by the books in the case of a clergyman who holds a benefice or an ecclesiastical position of temporal profit

(1) 1 Cr. & J. 301, 305.
(2) 7 M. & W. 423, 426.
(3) 2 Ld. Raym. 1480.
(4) (1671) 2 Lev. 62.

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which may, by the very terms on which it is held, be put in peril of forfeiture by the slander. But this is an exception which has no application, notwithstanding peril of injury to his reputation in his calling, if the clergyman does not hold his benefice or position actually on these terms. Subject to the carefully-guarded exceptions to which I have referred, the rule is that laid down in Comyns' Digest, "Action upon the Case for Defamation" (D. 27): "But words not actionable in themselves, are not actionable, when spoken of one in an office, profession or trade, unless they touch him in his office, &c." In *Doyley* v. *Roberts* (1) Tindal C.J. applied the law as laid down in this passage by refusing relief to an attorney of whom it was falsely said that he had defrauded his creditors and been horsewhipped off the course at Doncaster. That this is the basic principle which limits the cases in which the common law permits general damages to be awarded was laid down in striking language in the judgment of the Court of King's Bench in *Ayre* v. *Craven* (2), delivered by Lord Denman C.J. "Some of the cases," he said, "have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery; and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution. Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay." There a physician had been accused of adultery, but the words did not in terms connect the imputation with anything done by him when acting in a professional capacity. This decision was followed in *James* v. *Brook* (3), when it was said that "even if the words have a natural tendency to produce injury in the profession, the declaration is wholly wanting in any explanation of the way in which the speaker connected the conduct with the profession."

My Lords, I think that these authorities and others which were referred to in the arguments at the Bar have settled the law too firmly to admit of our extending the exceptions which have been made further than the decided cases go. I agree with what was said by Lord Herschell in the judgment in *Alexander* v. *Jenkins* (4), which I have already quoted, and with the carefully-guarded judgment

(1) 3 Bing. N. C. 835.
(2) 2 Ad. & E. 2, 7.
(3) 9 Q. B. 7, 14.
(4) [1892] 1 Q. B. 797.

(1834) 4 LJ KB 35

of Swinfen Eady L.J. in the present case. If we were to admit that an action for slander can lie in the case of a schoolmaster who has not proved either that the words were spoken of him "touching or in the way of his calling," or that he has suffered the actual damage which is the historical foundation of the action, and is even now its normal requisite, I think we should be overruling *Ayre* v. *Craven* (1) and other decisions of great authority, and should be doing what only the Legislature can do to-day. It required an Act of Parliament, the Slander of Women Act, 1891, to enable a woman to recover general damages for an imputation of unchastity. In my opinion it would require an analogous Act to enable the present appellant to recover such damages for an imputation of adultery which was not obviously directed to his reputation as a schoolmaster. I am therefore of opinion that we have no option to do anything but dismiss this appeal with costs.

LORD SUMNER. My Lords, the facts of this case are of a familiar kind. The appellant, Mr. David Jones, is headmaster of the Llidiardau Council school, Rhoshirwaen, Pwllheli. He is an unmarried man and lives with his aunt. In May, 1914, Ellen Jones, who is a farmer's wife, told Elizabeth Jones, and, as was alleged, Eliza Griffiths too, that Mr. David Jones had committed adultery with Ellen Roberts. What is more, she added that Ellen Roberts herself had told her so. This came to the appellant's ears, and no doubt not to his alone, and he sued Ellen Jones and her husband for slander. A Carnarvon common jury awarded him 10*l*., which seems to show that they thought it an ordinary matter, but it is only fair to him to say that the defendants did not venture to support the charge, and for their part had no merits whatever. It is accordingly just the sort of case in which a contention fundamentally challenging long-settled law would be brought before your Lordships.

Lush J. at the trial put to the jury, with other questions, these two: "Were they (the words charged) spoken of him (the plaintiff) in the way of his calling, i.e., in such a way as to imperil the retention of his office?" and "Did they impute that he was unfit to hold his office?" The jury said "Yes" to both. Evidence of the suggested tendency to affect the plaintiff in his office was not called, an

(1) 2 Ad. & E. 2.

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admission having been made by counsel for the defendants. Of this admission two versions exist. The difference in form is slight, and no difference in substance was intended, but I think that the one actually made before verdict, in the hearing of the jury, is the one that should prevail. The substance of it, according to the shorthand note, is :—

" Lush J. : ' Can you suggest, Mr. Artemus Jones, that if a schoolmaster, in a place like this, is found misconducting himself with a married woman he is not likely to suffer in his employment ? '

" Mr. Artemus Jones (for the defendants) : ' I submit that he would suffer no more than a man following any other occupation, and I submit again that in order to get this evidence in, the foundation-stone must be laid—that the words were spoken of him in the way of his profession.'

" Lush J. : ' But you don't want evidence to show that he would not be kept in his employment if he misconducted himself in this way, but it does not follow that the words were spoken of him in the way of his profession.'

" Mr. Montgomery (for the plaintiff) : ' This is a fact upon which evidence ought to be given.'

" Lush J. : ' Then you may take it that it would be injurious.' "

The words of the slander itself made no allusion to the appellant's calling at all, and Elizabeth Jones, to whom they were spoken, when asked in cross-examination " The words were spoken to you not in reference to his position as a schoolmaster at all ? " said " Not at all." As for Eliza Griffiths, she failed even to prove publication. I therefore agree with the judgment of the Court of Appeal that " there was no evidence to leave to the jury on the first part of question 2, namely, ' Whether the words were spoken of the plaintiff in the way of his calling,' " and counsel's admission was merely that such words would be of an injurious tendency in the case of most men, including the plaintiff. The question, therefore, comes to be this : " In the absence of proof of special damage, of which none was given, is an imputation of adultery made against a man, who is in fact a schoolmaster but is not spoken of as such, a matter which is actionable per se ? "

My Lords, I think it was recognized in the appellant's argument that such an imputation does not necessarily and always do harm. The form in which the appellant's proposition was eventually

advanced was that words are actionable per se the natural consequence of which in ordinary circumstances would be to injure the person of whom they are spoken, or, alternatively, that words which impute to one who follows a particular calling the want of a general requisite for persons in that calling are, as a natural consequence, damaging to them, and are therefore actionable without proof of special damage.

On this contention the following observations arise at the outset. If words spoken of a person following a particular calling are actionable per se, when they impute the want of a general requisite for that calling, how came it that a statute was required in 1891 to enable a woman to sue for an imputation of unchastity, whether she was in employment or not, in the absence of proof of special damage? A reputation for chastity was certainly a general requisite for many of the employments of women before 1891, and, considering that judges have not been unfriendly to such plaintiffs, I think it would have been held to be generally requisite in almost all if such a conclusion would have done the victim of the slander any good. Nevertheless the Act had to be passed, because without it no woman had a remedy for spoken charges of unchastity, unless they were either spoken of her in the way of her calling or were followed by provable damage.

Next, how comes it that several generations of pleaders, in days when pleadings followed the law and often were its best expression, always averred that slanders were spoken "of and concerning the plaintiff in his profession or calling," stating it? Nobody ever pleaded that the plaintiff's calling was this or that, and the defendant spoke and published of him the words following, meaning thereby that he was lacking in some quality generally requisite in his said calling; yet such an averment, if good, would have helped many a lame case over the stile. Nobody ever tried to demur to the averment that the words were spoken of and concerning the plaintiff in his profession or calling. On the contrary, such an averment was expressly held to be proper and necessary: *James* v. *Brook*. (1)

Thirdly, except in the case of slanders imputing incontinence to beneficed clergymen of the Church of England and slanders imputing insolvency to persons who in fact are tradesmen (which last is

(1) 9 Q. B. 7.

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probably not a real exception), no plaintiff, at least since the time of Comyns' Digest, has ever recovered damages for a spoken imputation of incontinence, unless he either showed that the words were spoken of him in his calling or proved actual damage. Earlier cases, so far as they seem to be to the contrary, can, I think, be accounted for. They are often badly or too briefly reported; they are often cases in which after verdict the necessary allegation and proof that the words were spoken of and touched the plaintiff in his calling were presumed as a matter of course. How is this blank in the authorities to be explained, if the appellant's proposition be sound? For three centuries the Courts have been dealing with such imputations. They are, and long have been,—such is the weakness of our nature—a favourite weapon in the armoury of controversialists, male and female, in private life, and mankind has so often acted on the proverb that "hard words break no bones," that special damage has rarely been proved to have occurred. My Lords, before these considerations can be answered, it must be shown that the law has long been grievously misunderstood, and that requires cogent proof indeed.

My Lords, I will not cite at length the case of *Ayre* v. *Craven*. (1) I will only observe that, according to the report in the *Law Journal* (2), the plaintiff was an ordinary doctor at Hull, and so did not belong to that class of medical practitioners, which the appellant's counsel postulated but never defined, for whose professional wellbeing a reputation at least for continence was said not to be a general requisite. Instead I will refer to three cases long ago decided, and never, so far as I know, authoritatively impugned. In *Doyley* v. *Roberts* (3), in 1837, the jury found, first, that the words were not spoken of the plaintiff in his business as an attorney, but, second, that the words had a tendency to injure him professionally. It was held in banc that this was a verdict for the defendant. As Vaughan J. said, "When the jury found that these words were not spoken of the plaintiff in his character of attorney, they took the sting out of the imputation," and the passage from Comyns' Digest was cited with approval, which says "words not actionable in themselves, are not actionable when spoken of

(1) 2 Ad. & E. 2. (2) 4 L. J. (K.B.) (N.S.) 35.
(3) 3 Bing. N. C. 835, 840.

one in an office, profession or trade, unless they touch him in his office."

Ten years afterwards, in *Pemberton* v. *Colls* (1), the Court of Queen's Bench had before it the following proposition from Starkie on Slander: "Where a person holds an office or situation, in which great trust and confidence must be reposed in him, words which impeach his integrity generally, though they contain no express reference to his office, are actionable; since they must necessarily attach to him in his particular character, and virtually represent him as unfit to hold that office or situation." In a considered judgment the Court rejected it. I think that virtually this is the very proposition which is before your Lordships to-day.

In delivering the judgment of the Court of Exchequer in *Foulger* v. *Newcomb* (2) in 1867 Channell B. says: "One essential ingredient of a good cause of action for defamation is damage. The rules . . . . as to the cases in which such damage is implied by law are somewhat arbitrary; but the more important principles of them are now clearly defined. . . . . First, that from spoken words which impute misconduct in an office, trade, profession or business, the law implies actionable damage. Secondly, that . . . . they are actionable if they are shown actually to cause (as their legal and natural consequence) damage of a character which the law will recognise. In order that the rule as to slander of a man in his business may apply, it is necessary that the words (being capable of having reference to his business) should in fact be spoken of him in respect of his business. . . . . Next, it must appear that they tend to prejudice him in that business."

My Lords, Lush J., in the judgment which the appellant supports, disputes the necessity thus alleged by Channell B. "I have come to the conclusion," he says, "that in certain cases depending on the circumstances of the case, it is not necessary, in order to maintain an action, for the plaintiff to establish that the speaker did impute to the person defamed that he was guilty of some misconduct in the course of discharging the duties of his office. . . . . I think the expression 'in relation to his calling,' does not refer to the words used by the speaker . . . . in my opinion the meaning of that expression is this, that if the plaintiff cannot prove special damage,

(1) (1847) 10 Q. B. 461, 468. (2) (1867) L. R. 2 Ex. 327, 330.

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he must prove that the words were spoken of him in such a way and with such consequence, having regard to his calling . . . . that the words spoken would necessarily affect him in the following of that calling."

It was in the last words of this proposition that the appellant's counsel, at your Lordships' Bar, preferred to substitute for "necessarily" the words "as a natural consequence," or words to that effect. The learned judge relied on a class of cases in which it has been held that words imputing want of credit or insolvency to a person who, in fact, is a tradesman are actionable per se, even though the speaker has not, by his words or otherwise, shown that the imputation is made upon the plaintiff in his trade. *Best* v. *Loit* (1) is an early instance. Others are *Stanton* v. *Smith* (2) and *Whittington* v. *Gladwin*. (3) It is unnecessary to examine such cases in detail, for the reason for them is this, as given by Parke B. in *Jones* v. *Littler* (4): "Here the imputation is that of insolvency, which must be injurious; for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured." The explanation is thus peculiar to the case of tradesmen. The rule appears to be one going rather to the construction of the words used and laying down that mention of want of credit implies prima facie a reference to some trade involving credit, than one going to the question whether words can be actionable per se except words imputing crime or certain diseases or actually touching the party defamed in his trade. In any case, it has not been carried beyond cases of tradesmen, nor could it be said here that the imputation was one which must necessarily have been injurious to a schoolmaster. On the contrary, to use Parke B.'s observation on *Ayre* v. *Craven* (5) and *Doyley* v. *Roberts* (6), "it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters."

I think that, apart from this line of cases about tradesmen, Lush J. founded himself on a misreading of the often-quoted expression of

(1) 1 Roll. Abr. 59 (case 6).
(2) 2 Ld. Raym. 1480.
(3) (1826) 5 B. & C. 180.
(4) 7 M. & W. 423, 426.
(5) 2 Ad. & E. 2.
(6) 3 Bing. N. C. 835.

Bayley B. in *Lumby* v. *Allday* (1), "either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business." He treated this sentence as laying down two criteria of slanders actionable per se, either of which would suffice, as if words connecting the imputation with the plaintiff's office stood in contradistinction to words which did not so connect it with his office, but merely imputed to him the want of something which would be generally requisite for such office. This sentence, however, only purports to summarize the authorities, and in the sense in which it was understood by Lush J. the authorities do not bear it out. Furthermore, the general requisites of which it speaks are qualities at large, whether moral or intellectual, and such qualities only become requisites when they are requisite for something else. Fidelity, for example, is a requisite of an employment of trust. Capacity implies such kind of capacity as the particular occupation requires. Thus the first part of the sentence, like the second, involves a reference to the plaintiff's calling; it opposes an imputation of the want of some general requisite for that calling to particular imputations on his conduct in that calling. I agree with the passage in the judgment of the Court of Appeal (2): "In our opinion, words imputing adultery, profligacy, immoral conduct, or the like, whether referring to behaviour on a particular occasion or to conduct in general, even when spoken of a man holding an office or carrying on a profession or business, are not actionable without special damage unless they relate to his conduct in the office, profession, or business, or the imputation is connected with his professional duties."

My Lords, it has often been said that the right to sue for words spoken, when no damage can be proved, ought not to be extended. As Martin B. observes in *Allsop* v. *Allsop* (3), "The law is jealous of actions for mere words, and the rules limiting these actions ought to be adhered to here." I am sure that no one who has had even a short experience of the business of an ordinary civil assize would question the wisdom of this caution. If a change of the law is desired, it is from the Legislature, as it was in 1891, that relief must be sought. It could be simply obtained either by enacting that

(1) 1 Cr. & J. 301, 305. (2) [1916] 1 K. B. 351, 360.
(3) (1860) 29 L. J. (Ex.) 315, 317.

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a schoolmaster, &c., should be deemed to be a woman within 54 & 55 Vict. c. 51, s. 1, or that, for the purposes of actions of slander, imputations of incontinence in a man should be deemed to be imputations of a criminal offence, punishable by imprisonment. In the first case as to costs (no unimportant matter in these cases) a man's position would be equal, and in the latter superior, to a woman's.

My Lords, this part of the law of slander has sometimes come in for pretty sharp criticism, particularly from the judges who have applied it. The Court of Appeal in the present case says (1) "the law of slander is an artificial law . . . . It is not like a law founded on settled principles, where the Court applies established principles to new cases, as they arise." I think this does the common law on the subject less than justice. The law of defamation is founded on settled principles. Defamation, spoken or written, is always actionable if damage is proved, and, even if it is not, the law will infer the damage needed to found the action (1.) when the words are written or printed; (2.) when the words spoken impute a crime punishable with imprisonment; (3.) when they impute certain diseases naturally excluding the patient from social intercourse; (4.) when words are spoken of a person following a calling, and spoken of him in that calling, which impute to him unfitness for or misconduct in that calling. The classification is one of words, not of persons, but it is a classification only. There is no reason why all four classes of words should be held to import legal damage for the same or for some analogous reason. I think these rules are as well established, as worthy of being called principles, and as capable of being applied to new cases when they arise, as are most rules or principles of law or equity. Perhaps they are neither ideally just nor ideally logical, but principles are like that. For myself I am quite content to take the law as I find it.

My Lords, I think that the appeal should be dismissed with costs.

LORD PARMOOR. (2) My Lords, the appellant is a schoolmaster appointed to that office by the Carnarvonshire County Council. The female respondent spoke words imputing to him moral misconduct with a married woman. There was no proof of damage and

(1) [1916] 1 K. B. 358. (2) Read by Lord Sumner.

no imputation of misconduct in the discharge by the appellant of his office as teacher. The words were spoken of him in his private character. The jury found that the words were spoken of the appellant in such a way as to imperil the retention of his office. It was proposed at the trial to call Mr. Evan R. Davies to give evidence on the question whether the alleged slander would tend to lose the appellant his employment. The learned judge thought it was not necessary to call evidence on a matter which no one could doubt. Mr. Artemus Jones, counsel for the respondents, did not question this inference, but made it quite clear that in his opinion no action would lie unless the words were spoken of the appellant in the way of his profession, and that the words must be distinctive—that is to say, of such a character as would, in a special manner, be injurious to a teacher as distinguished from any other public officer. "The admission I made was that undoubtedly a public authority would remove him, just as I submit it would remove any other of its servants." Without determining how far the question is one for the jury, or of inference by the judge, in this instance the judge and the jury took the same view, and I think the case must be considered on the basis that the words spoken were such as would necessarily imperil the continuance of the appellant in his office as teacher.

The principle that damage of some kind is essential to maintain an ordinary action of slander is not open to question. There are, however, certain cases in which the law assumes the probability of damage without requiring proof. It is not necessary that the damage should be pecuniary. This is illustrated in an action for words imputing that the plaintiff is suffering from certain forms of contagious disease, which tend to ostracize him from society. In this case the law will assume damage without requiring proof, as also in cases in which a criminal offence is imputed to the plaintiff, or in which the words spoken impute to the plaintiff misconduct, or want of skill or capacity, in the duties or requirements of his office, profession, or trade. There is a further case of much difficulty, where the words on which the action is founded are spoken of the plaintiff in his private character, but impute to him the want of some quality or capacity requisite to render him a fit person to hold the office in which he is, or to pursue the profession or vocation in which he is engaged. The most common instance is that of words

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which impute dishonesty to a trader, in which case the law assumes damage without requiring proof. The question in debate is whether words spoken, which impute to a teacher moral misconduct with a married woman, are actionable per se upon probability of damage and come within the category of those cases in which the law assumes damage without requiring proof.

The principle above referred to is illustrated in three cases to which reference was made during the argument before your Lordships. In *Lumby* v. *Allday* (1) Bayley B., who delivered the judgment of the Court, said : " Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business." This passage does not purport to say that whenever words import the want of some general requisite they are actionable without proof of damage, but that they are not actionable unless they comply with one or other of the two conditions.

In *Jones* v. *Littler* (2) Parke B. says : " The learned judge did leave the question to the jury, whether the words were spoken of the plaintiff in his trade ; and, indeed, it is plain that the words were so used, from the fact, that in the conversation in question, the plaintiff was spoken of as a brewer. Independently of that, however, and even if they were spoken of him in his private character, I think the case of *Stanton* v. *Smith* (3) is an authority to show that the words would have been actionable, because they must necessarily affect him in his trade. It is there said : ' We were all of opinion that such words spoken of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore that they were actionable.' "

Parke B. then distinguishes the case he is considering from *Ayre* v. *Craven* (4) and *Doyley* v. *Roberts* (5) on the ground that " it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters. But this case is distinguishable, because here the imputation is that of insolvency, which must be injurious ; for if a

(1) 1 Cr. & J. 301, 305.
(2) 7 M. & W. 423.
(3) 2 Ld. Raym. 1480.
(4) 2 Ad. & E. 2.
(5) 3 Bing. N. C. 835.

tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured. The case of *Stanton* v. *Smith* (1), as it appears to me, is good law, notwithstanding the observations of Coltman J. in *Doyley* v. *Roberts*." (2)

Parke B. does not say that he would have come to the same conclusion as Lord Denman in *Ayre* v. *Craven* (3), and in *Gallwey* v. *Marshall* (4) Alderson B. said: "There are certain professions, the proper exercise of which depends on morality; and except for the case of *Ayre* v. *Craven* (3), I should have thought that that of a physician is one of them."

In *Alexander* v. *Jenkins* (5) Lord Herschell said that with regard to a man's business, profession, or any office of profit, the words spoken to be actionable per se "must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would show that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office. So much with regard to offices of profit; the reason being that in all those cases the Court will presume, or perhaps I should rather say the law presumes, such a probability of pecuniary loss from such imputation, in that office, or employment, or profession, that it will not require special damage to be shewn. It may be said to be an arbitrary rule. Be it so; but the rule is, at all events, laid down, and seems to me to rest on that basis."

Sir Robert Finlay, in his exhaustive review of all the relevant cases, did not bring any to the notice of your Lordships in which an imputation on a plaintiff's moral character in his private life had been held to be actionable without proof of damage, except the case of a clergyman in the Church of England, when accused of misconduct which might cause him to be deprived of his benefice, in which he otherwise had a freehold interest, or to lose a chaplaincy from which he can be removed: *Pemberton v. Colls* (6); *Payne* v. *Beuwmorris*. (7) It does not follow that words which would be

(1) 2 Ld. Raym. 1480.
(2) 3 Bing. N. C. 835.
(3) 2 Ad. & E. 2.
(4) 9 Ex. 294, 297.
(5) [1892] 1 Q. B. 797, 800.
(6) 10 Q. B. 461.
(7) 1 Lev. 248.

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actionable in the case of a beneficed clergyman would be actionable if he is unbeneficed or without any other preferment: *Gallwey* v. *Marshall.* (1)

It was argued on behalf of the appellant that, although no precedent could be found in the books, the case came within a principle which had been already recognized, and that the words spoken are actionable per se since they could not fail to be injurious to the plaintiff and imperil the continuance of his office as teacher. If the matter was open, I think that there is much weight in this argument. It is difficult to find any distinction in principle between a charge of dishonesty made against a trader in his private character and a charge of immorality made against a teacher in his private character. A teacher holds an office of high importance and responsibility, involving the care of the morality and character of his pupils. Apart from the finding of the jury, I agree with the conclusion of Lush J. that the words spoken, which imputed to the appellant moral misconduct with a married woman, cannot fail to be injurious to him in the office which he holds. The conclusion which might naturally be drawn is that the law would assume damage without requiring proof. I am forced, however, to an opposite conclusion. The matter is not open. As the law of slander stands, words imputing moral misconduct to a plaintiff who holds an office such that the imputation cannot fail to be injurious to him are not actionable without proof of special damage unless they relate to his conduct in the office, or import an imputation connected with his official duties. Accepting, in this respect, the view taken by the Court of Appeal, it is unnecessary to consider the numerous cases to which your Lordships were referred. The judgment of Lord Denman in *Ayre* v. *Craven* (2) is directly in point. Dr. Ayre, a physician, was accused as being a party in a crim. con. affair that had been long talked about, the innuendo being moral misconduct with a married woman. Lord Denman, after citing Bayley B.'s judgment in *Lumby* v. *Allday* (3), says: "In the present case much doubt was entertained, whether the words were not actionable within the rule just adverted to. For, being laid as spoken of the plaintiff as a physician, in which character he may have opportuni-

(1) 9 Ex. 294.

(2) 2 Ad. & E. 2, 8.

(3) 1 Cr. & J. 301.

ties of abusing the confidence reposed in him, to commit acts of criminal conversation, the statement must be thought large enough to admit such proof to be adduced on the trial, in which case the necessary proof would be presumed to have been given, and the judgment ought not to be arrested. But, after full examination of the authorities, we think that, in actions of this nature, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession. For this defect the judgment must be arrested." The law as stated by Lord Denman has been accepted in later cases, and it cannot now be altered without an act of the Legislature.

If it is necessary to find an historical reason why the imputation of immorality has been treated in a different way from the imputation of dishonesty, it may be found in a passage in Blackstone's Commentaries, book 3, ch. 8, p. 124. "So scandals, which concern matters merely spiritual, as to call a man heretic or adulterer, are cognizable only in the Ecclesiastical Court; unless any temporal damage ensues, which may be a foundation for a per quod." Up to 1855 a person in the position of the appellant still had a nominal remedy in the Ecclesiastical Courts, which had power to inflict penance on the defendant, though not to award damages to the plaintiff. By the statute 18 & 19 Vict. c. 41 the power of the Ecclesiastical Courts "to entertain or adjudicate upon any suit for or cause of defamation" was taken away, but no change was made in the remedies available in the secular Court. A further argument against the contention made on behalf of the appellant may be found in the Slander of Women Act, 1891. Up to this date charges of unchastity or immorality against women were not actionable without proof of special damage. Sect. 1 enacts that words spoken and published after the passing of the Act which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable, provided always that in any action for words spoken and made actionable by the Act a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action. If protection from imputations of unchastity or adultery in their private character is to be extended to men by

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giving a right of action without the necessity of proof of special damage, this is a matter not for your Lordships, but for the Legislature.

My Lords, the appeal fails and should be dismissed.

LORD WRENBURY. My Lords, slander is actionable only if either (1.) special damage is proved, or (2.) the imputation is such and the state of facts proved is such as that the law presumes or infers damage, or (3.) the case falls within the Slander of Women Act, 1891. This is a concise, and I hope an accurate, statement of the law.

Damage includes, but is not confined to, pecuniary damage. Slander by imputation of contagious disease, such as leprosy, is actionable. The damage in such case is the exclusion of the plaintiff from society. Slander by imputation of misconduct in an office which is not an office of profit is actionable. The reason for this is not very clear, but would seem to be that the slander might, if true, show that the man ought to be deprived of his office: see Lord Herschell in *Alexander* v. *Jenkins*. (1) At any rate it is not pecuniary damage. The damage need not be (although in most cases it is) pecuniary, but there must be damage proved or as matter of law presumed.

The fact that the imputation is a gross and grievous attack upon personal character is not of itself enough. For otherwise a statute would not have been necessary to enable a woman or a girl to sue for slander upon her chastity. The imputation must be such and the state of facts such, *not* as that a judge would necessarily or reasonably presume or infer damage, but as that judges in the past have presumed or inferred damage. This involves a confession which I fear must be made that the law of slander rests not upon any principle whose elasticity will admit new cases, but upon artificial distinctions. An artificial and arbitrary rule is not a principle. The plaintiff must for success bring his case within the very limited class of cases in which slander has been held actionable. He must show that the imputation is such and the state of facts is such as that a presumption of damage as matter of law has been made in the past under like circumstances. I am of course here

(1) [1892] 1 Q. B. 797, 802.

speaking, and throughout this opinion I am speaking, of cases in which damage is not proved.

Setting aside the case of slander actionable by statute under the Slander of Women Act, 1891, there are only three heads within some one of which the plaintiff must bring his case ; they are :

1. Imputation of crime.

2. Imputation of a contagious disease tending to exclude the plaintiff from society.

3. Imputation against the plaintiff in the way of his office, profession, or trade, or which will touch him in the way of his office, profession, or trade.

The present case is sought to be brought under the third head.

The instance of " touching a man in his trade," which is most profusely illustrated by authority, is the imputation of insolvency to a trader. In such a case it would seem that there is no necessity for a colloquium ; for speaking, that is, of the insolvency with reference to the trade. The law, it appears, will take notice of the fact that solvency is so essential a factor in the existence of a trader that to speak of him as insolvent will necessarily " touch him in his trade " ; it is an attack upon a necessary part of his trading equipment. This seems to be the ratio decidendi in *Read* v. *Hudson* (1) (a laceman), *Stanton* v. *Smith* (2) (a weaver), *Hooker* v. *Tucker* (3) (a merchant), *Whittington* v. *Gladwin* (4) (a merchant), and *Jones* v. *Littler* (5) (a brewer).

By contrast with these cases is the case of the attorney or solicitor. In that case it would seem that there must be colloquium : the words must be spoken of the plaintiff in the matter of his profession. If not, his action will fail : *Doyley* v. *Roberts* (6) ; *Dauncey* v. *Holloway*. (7) In that case the words are not actionable unless they impute either impropriety or misconduct in relation to or in connection with the profession or want of capacity to carry on the profession. It seems to have been assumed, but why I cannot say, that solvency is not a necessary part of the equipment of a solicitor. But even a solicitor

(1) 1 Ld. Raym. 610.
(2) 2 Ld. Raym. 1480.
(3) (1694) Holt, 39.
(4) 5 B. & C. 180.
(5) 7 M. & W. 423.
(6) 3 Bing. N. C. 835.
(7) [1901] 2 K. B. 441.

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may be allowed an opportunity of proving special damage: *A. B.* v. *C. D.* (1) An imputation of dishonesty seems to be enough in the case of a surveyor: *Blunden* v. *Eustace.* (2) The reason assigned (one which, to myself, is far from convincing) is that "a surveyor is an officer of skill and there is such an officer for the King who is mentioned in Acts of Parliament by that name." From which it seems to have been inferred that the words touched him in his profession. Probably the case is saved by the fact that the defendant had "communication with him [the plaintiff] about the measuring of land."

If the office be one of trust, an imputation of dishonesty in the calling touches the plaintiff in his calling and is actionable: *Seaman* v. *Bigg.* (3) If the office be an office of honour but not of profit, imputation of "misconduct in the office is actionable"; but a gross imputation such as that the plaintiff is an habitual drunkard and unfit for the office is not: *Alexander* v. *Jenkins.* (4) Lord Herschell's judgment in that case is most instructive, and leaves the reader convinced that to look for a principle in the law of slander is an idle quest. Legislation is the only remedy which can establish a principle or lay down a satisfactory code. Lord Herschell summarizes this part of the law by saying that in the case of the office of profit "It must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would show that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office"; and that in the case of the office not of profit the mere imputation of want of capacity or ability is not enough; but there must be an imputation that the man ought to be deprived of his office, and which therefore involves a risk of exclusion from the office.

Solvency in a trader is perhaps the best illustration of what I take it was meant by the expression "general requisite" in the often quoted words of Bayley B. in *Lumby* v. *Allday.* (5) It seems to mean something which the law recognizes without evidence as being necessary in the calling—something necessary in the calling as

(1) (1904) 7 F. 22.
(2) Cro. Jac. 504 (case 15).
(3) Cro. Car. 480 (case 3).
(4) [1892] 1 Q. B. 797.
(5) 1 Cr. & J. 301, 305.

distinguished from something which may lead to dismissal from the calling. "Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business." The latter will do as, e.g., if there be an imputation of unchastity in a servant girl *in relation to her employment: Connors* v. *Justice*. (1) But if the words are not applicable to conduct in the profession or calling the slander is not actionable, even though the words impute to a clergyman incontinence (he being unbeneficed): *Gallwey* v. *Marshall* (2); or to a governess prostitution: *Wharton* v. *Brook* (3); or to a clerk of a gas company gross immorality: *Lumby* v. *Allday*. (4) In such a case the law seems to be that if the imputation does not touch the plaintiff in his calling there must be the colloquium, the words must be spoken of him in his profession. The strongest case is *Ayre* v. *Craven* (5), where the words imputed adultery to a physician. Lord Denman there concludes his judgment by saying: "In actions of this nature the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession." That case was followed in *James* v. *Brook* (6), where the defamation was of a salaried superintendent of police, and upon motion in arrest of judgment the judgment was arrested on the ground that the declaration did not show how the speaker connected the imputation with the profession. In *Jones* v. *Littler* (7) the mention in the slanderous conversation of the man's trade (that of a brewer) would seemingly, apart from the fact that the imputation was of insolvency to a trader, have been enough.

The case before your Lordships' House is that of a schoolmaster and the imputation is one of moral misconduct with a married woman. The calling was not mentioned in the conversation. The jury found that the words were spoken of the plaintiff in the way of his calling, but the Court of Appeal held (and I agree) that there was no evidence to support that finding. The question put to the jury,

(1) 13 Ir. C. L. R. 451.
(2) 9 Ex. 294.
(3) 1 Vent. 21.
(4) 1 Cr. & J. 301.
(5) 2 Ad. & E. 2, 8.
(6) 9 Q. B. 7.
(7) 7 M. & W. 423.

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however, goes on thus: "In the way of his calling, that is, in such a way as to imperil the retention of his office." I am unable to follow the intention of this paraphrase, or to see that it is a paraphrase. The jury answered the question in the affirmative, and further found that the words imputed that he was unfit to hold his office. What has most pressed me in the case is that Mr. Artemus Jones, who appeared for the defendants, admitted at the trial that the imputation would endanger the plaintiff's position. He admitted (to use his own expression, on further consideration) that "undoubtedly a public authority would remove him just as it would remove any other of its servants." His point was not that the imputation would not injure him, but that it was not said of him in his profession of a schoolmaster. In consequence of his admission the plaintiff abstained from calling evidence upon this point. I feel great doubt whether under these circumstances it was not open to the jury to find as they did, and whether the only point left was not whether the absence of the colloquium was necessarily fatal. This, I think, would be a point which would require careful consideration. However, as your Lordships do not attach the importance which I do to this aspect of the case, I shall not press my view to the extent of differing from the motion proposed by the noble and learned Lord on the woolsack.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 28, 1916.

Solicitors for appellant: *Baker & Nairne.*

Solicitors for respondents: *Rhys Roberts & Co., for Lloyd George & George, Criccieth.*

[HOUSE OF LORDS.]

GREAT CENTRAL RAILWAY COMPANY . APPELLANTS ; AND HEWLETT . . . . . RESPONDENT.

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Negligence—Obstruction in Highway—Legalization by Statute—Reduction of Lighting Regulations—Accident—Great Central Railway Act, 1902 (2 *Edw.* 7, *c. cxxxv.*), *s.* 31.

A railway company, for the more convenient management of their station, erected in the public highway certain gate posts from which collapsible steel gates could be run across the road so as to close the entrance to the station yard. These posts were erected by the company in contravention of their special Act, and in 1901 were judicially held to be an obstruction to the highway. In 1902 the company obtained an Act which empowered them to "maintain" the posts and gates and to replace them, when necessary, on the same site.

A licensed taxicab-driver, while lawfully driving his cab on a dark rainy night along the public highway into the station yard, collided with one of these posts (which was practically invisible owing to the darkening of the street in compliance with the Reduction of Lighting Regulations) and thereby damaged his cab. The post was in the condition in which it was at the time of the passing of the Act of 1902. In an action by the cabdriver against the railway company for damages for negligence :—

Held, that the accident arose, not from any overt act of the company, but from the existence of the gate post, which had been legalized by the Act of 1902, coupled with the diminution of light necessitated by the exigencies of the war ; that the mere power to maintain the post imposed no obligation on the company to take reasonable precautions to warn the public of its existence ; and that therefore the company was not guilty of negligence.

Manley v. *St. Helens Canal and Ry. Co.* (1858) 2 H. & N. 840 distinguished.

Moore v. *Lambeth Waterworks Co.* (1886) 17 Q. B. D. 462 applied.

Decision of the Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal refusing an application for judgment or a new trial in an action tried before Darling J. and a special jury.

* *Present :* LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD WRENBURY.

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The action was brought by the respondent against the appellants for damages for negligence.

Some time before the year 1901 the appellants, in contravention of s. 91 of their principal Act (the Manchester, Sheffield, and Lincolnshire Railway (Extension to London, &c.) Act, 1893), erected in the public highway three gates and posts at the entrances of the forecourt of their Marylebone Station for the more convenient management of their station. One of these gates was situate in Melcombe Place. It was a collapsible steel gate painted dark red and sliding back into a lattice-work steel pillar. It stood upon a stone platform or refuge in the centre of the highway, and at either end of the refuge there was a protecting iron post about 3 feet high. A space of 12 feet $8\frac{1}{4}$ inches was left on either side of the refuge for the use of the traffic traversing the highway. There were two similar lattice-work pillars on the pavement on either side. In 1901, in an action brought by the London County Council against the appellants, Bigham J. held that these gates and posts were a nuisance and an illegal obstruction of the highway. The appellants thereupon obtained a further special Act to legalize these erections.

By s. 31 of the Great Central Railway Act, 1902 (2 Edw. 7, c. cxxxv.), it was enacted that, notwithstanding anything in s. 91 of the principal Act contained, "the company may maintain the gate posts and gates erected by them at the three entrances of the forecourt of their Marylebone passenger station lying between that station and the Great Central Hotel and may from time to time when necessary renew and replace the same in the same site and position but such gates shall be at all times kept open for the free passage of the public through and along the said forecourt save and except in times of emergency when it may be expedient in the interests of public order and for securing the free and uninterrupted access of passengers to and from the said station to close the said gates but the company shall not close the same unless and until they have given notice in writing to the London County Council and to the borough council of Marylebone of their intention so to do and they shall keep them closed only for such time as is absolutely necessary for effecting the objects aforesaid."

The respondent was a licensed driver of a taxicab. On the night of April 12, 1915, shortly after midnight, he was driving his cab

along Melcombe Place from the direction of Dorset Square towards the station yard in answer to a whistle from the station or from the Great Central Hotel, which adjoined the station. The night was very dark and it was raining. He was driving at about six or seven miles an hour in the centre of the road. As he was proceeding into the station yard his cab came into collision with one of the posts guarding the gate at the Melcombe Place entrance to the station, with the result that his cab was damaged.

Melcombe Place was a public highway, and was lighted by the council of the borough of St. Marylebone in discharge of their duty as the local authority. The appellants also provided certain lamps in and about the station yard, but they were under no obligation to do so. The only two lamps in the immediate vicinity lighted on this night were, first, an electric lamp provided by the borough council at a distance of 17 feet 6 inches from the gate, and, secondly, an incandescent gas lamp belonging to the appellants at a distance of 36 feet 8 inches from the gate. In the interests of public safety and as a protection against hostile aircraft the normal light of these lamps had been reduced in compliance with Orders made by the Home Secretary under the powers of the Defence of the Realm (Consolidation) Regulations, 1914. Owing to the diminution of the street illumination the post and gate, though still visible on a fine night, could not be seen by the respondent.

By his statement of claim the respondent alleged that the collision was brought about by the negligence of the appellants in failing to have a light placed on or near the said post and/or refuge, and/or in not making or painting the same white, and/or in not boarding up and making solid the said trellis-work gate, and/or in not taking any or any sufficient precautions to warn persons lawfully using the highway of the presence of such post and/or refuge thereon.

The respondent further alleged that the said post and refuge amounted to a nuisance on the highway, but in the House of Lords this claim, though not formally abandoned, was not pressed.

The appellants by their defence denied that they were guilty of any negligence or nuisance, and by paragraph 6 they alleged that the said post and the base thereof were maintained and kept by them under the powers of their special Act of 1902, which powers were

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duly conformed to and exercised by them, and that they were under no legal duty or obligation, either by the terms of the statute or otherwise, to illuminate the said post and the base thereof, but were entitled to maintain them without any light thereon pursuant to the terms of the statute.

At the trial it was conceded that the gate and post in question were in the same condition at the date of the collision as they had been at the date of the passing of the Act of 1902. Counsel for the appellants submitted that there was no evidence of negligence to go to the jury inasmuch as no breach of duty had been proved against the appellants. Darling J. rejected this contention. He said that under the statute it was optional with the appellants whether they would keep the post where it was or take it away, and if in the unforeseen circumstances due to the state of the war they chose to keep the post in its present position they must keep it there in such a way as to prevent its being a danger to people using the highway, provided they could do so without interfering with the Lighting Orders.

The jury returned a verdict in favour of the respondent for 50*l.* damages, and the learned judge entered judgment accordingly.

The Court of Appeal (Lord Reading C.J., Warrington L.J., and Scrutton J.) affirmed this judgment. Lord Reading C.J. held, upon the principle of *Geddis* v. *Proprietors of Bann Reservoir* (1), that, inasmuch as the special Act of 1902 contained nothing which absolved the appellants from the duty of exercising the powers thereby conferred upon them with reasonable care for the safety of the public, in the changed circumstances brought about by the Lighting Regulations it was open to the jury to find that the appellants were guilty of negligence in not taking proper precautions to prevent the post and gate from being a danger to the public using the highway.

1916. July 4, 6. *Sir John Simon, K.C.*, and *F. T. Barrington-Ward* (with them *Gordon Hewart, K.C.*), for the appellants. The appellants have committed no breach of duty, and therefore they are not guilty of negligence. There is no evidence of negligence on the part of the appellants in maintaining their station gates in the

(1) (1878) 3 App. Cas. 430.

way in which they have always maintained them in accordance with their statutory powers and in not lighting the public highway. The appellants are not liable for putting on the highway something which they had a right to put there. The obstruction becomes part of the highway, and the public must take the highway as they find it: *Moore* v. *Lambeth Waterworks Co.* (1); *Hartley* v. *Rochdale Corporation.* (2) The appellants do not dispute the general principle laid down in *Geddis* v. *Proprietors of Bann Reservoir* (3) that a company must exercise its statutory powers in such a way as not to cause needless injury to others; but here the appellants are exercising no statutory powers whatever, and there is therefore no relevant duty which has been broken.

W. A. Jowitt, for the respondent. In exercising a statutory power every one is under a common law duty not to injure the public: *Geddis* v. *Proprietors of Bann Reservoir* (4); *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (5); *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works* (6); *Vaughan* v. *Taff Vale Ry. Co.* (7); *Freemantle* v. *London and North Western Ry. Co.* (8) The statutory permission to put an obstacle on the highway does not involve that the obstacle becomes part of the highway, and in fact the gate and post in question belong to the appellants. Where a person under statutory authority puts something on the highway which but for that authority would be an obstruction, he must take reasonable care to prevent that obstacle from being a danger to the public. If an obstruction exists on a highway prior to dedication, the public must take the highway as they find it, but quite the contrary where the obstruction is placed on the highway after dedication, unless it merely replaces an old obstruction. Here the appellants ought to have warned the public of the presence of the obstruction either by affixing a lamp to the gate post or otherwise. The obligation to light flows from the existence of the obstruction. That obligation is clear in the case of a temporary obstruction, and there is no reason why it should not apply to the case of a permanent obstruction: *Parnaby* v. *Lancaster Canal Co.* (9); *McLoughlin* v.

(1) 17 Q. B. D. 462.
(2) [1908] 2 K. B. 594, 599.
(3) 3 App. Cas. 430, 445.
(4) 3 App. Cas. 430.
(5) (1866) L. R. 1 H. L. 93, 112.
(6) [1898] 2 Ch. 603, 611.
(7) (1860) 5 H. & N. 679.
(8) (1861) 10 C. B. (N.S.) 89.
(9) (1839) 11 Ad. & E. 223.

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Warrington Corporation (1); *Lamley* v. *East Retford Corporation* (2); *McClelland* v. *Manchester Corporation* (3); *Weld* v. *Gas Light Co.* (4); *Borough of Bathurst* v. *Macpherson.* (5)

Mellor v. *Heywood Corporation* (6) is distinguishable, because there the post was not on the highway itself. *Young* v. *Vestry of St. Mary's, Islington* (7) is very shortly reported, and it appears to be inconsistent with the current of authority. In keeping this post where it is the appellants are exercising their statutory powers. The Act of 1902 is ex post facto legislation, and must not be taken as declaring that the obstruction was at the time in a perfect condition. The effect of the statute is the same as if a power had been granted to erect a post, supposing no post had been already erected, on the site in question. "Maintain" means maintain in a state of reasonable safety to the public at all times and under all circumstances. *Manley* v. *St. Helens Canal and Ry. Co.* (8) is precisely in point. There the defendants, a company incorporated by statute for the purpose of making a canal, carried a highway over their canal by a swivel bridge, which was opened to allow boats to go through, and by a subsequent Act the defendants were authorized to maintain existing bridges. The Court assumed that the bridge was sufficient at the time when it was built, but held that the defendants were bound to maintain a bridge sufficient with reference to the then existing circumstances, and that the jury were warranted in finding negligence on the part of the defendants in omitting to light and fence the bridge. The authority of that case, which was cited in *Sharpness New Docks and Gloucester, &c., Navigation Co.* v. *Attorney-General* (9), is not impaired by the decision of the House of Lords in the latter case, because all that was there decided was that upon the construction of the statute there in question maintenance did not involve reconstruction. So here in the special circumstances at present existing the appellants were guilty of negligence in not taking all reasonable precautions to warn the public of the existence of the obstruction. *Moore* v. *Lambeth Waterworks Co.* (10) is distinguishable, because there the plaintiff was demanding from the defendants

(1) (1910) 75 J. P. 57.
(2) (1891) 55 J. P. 133.
(3) [1912] 1 K. B. 118.
(4) (1816) 1 Stark. 189.
(5) (1879) 4 App. Cas. 256.
(6) (1884) 48 J. P. 148.
(7) (1896) 60 J. P. 821.
(8) 2 H. & N. 840.
(9) [1915] A. C. 654.
(10) 17 Q. B. D. 462.

something beyond reasonable care. [He also referred to *Reg.* v. *Bradford Navigation Co.* (1)]

Sir John Simon, K.C., in reply. An obstruction authorized by statute to be put on the highway is on the same footing as an obstruction existing prior to dedication. There is no such thing as a common law obligation to light a fixed object which is lawfully on the highway, and the whole law on this subject is contained in the statutory provision—e.g., Towns Improvement Clauses Act, 1847, s. 81. In this case there is no common law or statutory duty on the appellants to light, once they are immune from the consequences of putting up the obstruction. The law as to obstruction of highways is thus stated in *Fisher* v. *Prowse* (2) and in *Gautret* v. *Egerton.* (3) *Geddis* v. *Proprietors of Bann Reservoir* (4) is discussed in *Thompson* v. *Brighton Corporation* (5), which followed *Moore* v. *Lambeth Waterworks Co.* (6)

The House took time for consideration.

July 28. LORD PARKER OF WADDINGTON. My Lords, the facts of this case are simple, and the question for determination is a question of law only.

By the Manchester, Sheffield, and Lincolnshire (Extension to London, &c.) Act, 1893, the railway company, now known as the Great Central Railway Company, obtained power to construct the Marylebone Railway Station with the approaches thereto, and certain ancillary powers with reference to the construction of new roads and some degree of interference with existing roads; but it was provided by the 91st section that the company should, unless otherwise agreed between the company and the London County Council and the vestry of the parish of St. Marylebone, leave the roadways and open space between the Marylebone Road and the south front of the company's passenger station buildings, as shown on the plan signed by Sir Richard Paget, the chairman of the Committee of the House of Commons to whom the bill for the Act was referred, and the whole of the said roadways and open space should be left open for public use.

(1) (1865) 6 B. & S. 631.
(2) (1862) 2 B. & S. 770.
(3) (1867) L. R. 2 C. P. 371, 373.
(4) 3 App. Cas. 430.
(5) [1894] 1 Q. B. 332, 341.
(6) 17 Q. B. D. 462.

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Among the roadways shown on the signed plan was an old roadway known as Melcombe Place, the whole area of which ought therefore, according to the provisions of the 91st section, to have been left open to the public. Nevertheless the company, without obtaining the necessary consents, at some time prior to 1901, for the more convenient management of their station, erected in Melcombe Place certain gate posts from which collapsible steel gates could, when deemed advisable, be run out across the roadway so as to close the entrance therefrom to the station yard. In so doing the company unlawfully obstructed the roadway and created a public nuisance. Subsequently, however, by the 31st section of the Great Central Railway Act, 1902, it was (inter alia) provided that, notwithstanding anything to the contrary contained in the 91st section of the earlier Act, the company might maintain the gate posts and gates in question, and might from time to time, when necessary, renew and replace the same in the same site and position, but such gates should be at all times kept open, save and except in times of emergency, and so that the company should not close the same without giving the notices therein specified.

The effect of the 31st section of the Act of 1902 was undoubtedly to convert what had theretofore been an unlawful obstruction to the highway, and therefore a public nuisance, into something the existence of which was perfectly legal and could in itself give rise to no right of action whether based on nuisance or otherwise.

In the early hours of April 13, 1915, the respondent, while driving his cab from Melcombe Place into the station yard, collided with one of the posts in question and sustained damages the amount of which has been agreed at 50*l*. In the action in which this appeal arises the respondent sought to recover these damages from the railway company, on the ground, first, that the company had been guilty of negligence, and, secondly, that the posts amounted to a nuisance on the highway. It was admitted that the posts were at the time of the collision in precisely the same condition as when the Act of 1902 was passed. So far, therefore, as it was based on nuisance the respondent's claim was untenable and was not insisted on. The action turned on the question of negligence only.

The negligence alleged was the omission of the company (1.) to illuminate the posts to a degree sufficient to enable the respondent

to avoid a collision; (2.) to paint the posts white so as to render them more visible; (3.) to board up the trellis-work so that the obstacle could not be seen through; and (4.) to take precautions to warn persons using the highway of the existence of the obstacle. It was proved that the company had done none of these things. If, therefore, as held by Darling J. and the Court of Appeal, the company were under a duty to take such steps as might from time to time be reasonable for the protection of the public against collision with the posts, it was a question for the jury whether the company ought reasonably under the circumstances to have done any of the things the omission to do which was relied on as constituting negligence, and the appeal must fail. If, on the other hand, your Lordships are of opinion that the company were under no such duty, the appeal must succeed.

My Lords, it is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damage for negligence may be recovered. To bring this principle into play in the present case the company must be shown to have been exercising a statutory power the exercise of which was likely to occasion and did occasion the collision. The only statutory power which the company can be said to have been exercising is the power to maintain the posts conferred by s. 31 of the Act of 1902. What is the meaning of the word "maintain" as used in this section?

Negatively it relieves the company from any obligation which might otherwise have existed to remove the posts. Positively it enables the company to do what is necessary to keep the posts there. It is only in its negative aspect that the company can be said to have been exercising this power. It has, in fact, done nothing at all.

Is the principle relied on really applicable under these circumstances? In my opinion it is not. It seems to me that for its application the company must be doing something involving risk to others without taking reasonable precautions to obviate such risk. Here the risk arises, not from what the company is doing, but from the existence of the gate posts legalized by the Act coupled with the diminution of light necessitated by the exigencies of the war. It

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is reasonably certain that the Legislature was, under the circumstances which prevailed when the Act was passed, satisfied that there was no appreciable risk to the public; otherwise the legalization of the obstruction without expressly providing precautions to obviate the risk would be inexplicable. The change of circumstances cannot be relevant on any question of construction, and in my opinion the Act does not impose on the company any such obligation as suggested by the respondents, nor can any such obligation be based on the principle relied on.

Turning to the authorities cited in argument, your Lordships will find that two only have any bearing on the point for decision. The first is the case of *Manley* v. *St. Helens Canal and Ry. Co.* (1) In that case a canal company, having by their special Act power to make a canal cutting across a public highway and to carry the highway over the canal by means of a convenient bridge, erected for the purpose a swivel bridge which had to be opened whenever boats were passing up or down the canal, thereby causing on each occasion a dangerous gap in the highway. Subsequently the company obtained another special Act which recited that the works authorized by the earlier Act had been completed and authorized the company to maintain the same and conferred on all persons the right to navigate the canal with boats for commercial purposes. A boatman opened the bridge to allow the passage of his boat along the canal, and the plaintiff's husband having fallen into the gap thus formed, an action was brought against the company for negligence. The action succeeded, but the reasons given by the judges differ. Pollock C.B. and Martin B. held that the original obligation of the company was to make and maintain a sufficient bridge, and that the obligation to maintain was not discharged by maintaining a bridge which, however sufficient 100 years ago, had, having regard to the altered circumstances, ceased to be sufficient for the public protection. The recital in the second Act did not operate to alter the company's obligations. Watson B., on the other hand, thought that, even admitting that the company had discharged their original obligation in making a sufficient bridge, they were liable for negligence in not taking precautions to prevent the bridge being used to the public danger. The bridge, he thought, ought to have been

(1) 2 H. & N. 840.

lighted and watched by the company. Channell B. was also of this opinion. As the bridge was liable to be opened, he assumed, he said, that the company were bound to take some precautions with reference to it. Perhaps there was no obligation to make a fixed bridge, but if the company made a swivel bridge, there supervened on the statutory right a common law obligation to accompany the bridge with all necessary surrounding protection. In my opinion, apart from the diversity of opinion among the judges, this case is not really in point. The bridge erected was such that it must create danger to the public by causing a gap in the highway every time it was opened for traffic. It was not a work expressly authorized or sanctioned by the Legislature. The case, therefore, cannot be used as an authority for the proposition that a mere power to maintain what the Legislature has expressly sanctioned involves any obligation towards the public.

The second case to which I have referred is *Moore* v. *Lambeth Waterworks Co.* (1) There the defendants, pursuant to a statutory power, had fixed a fire-plug in a highway. The work was done without any negligence and in a proper workmanlike manner, the top being left level with the surface of the highway. By reason of the subsequent wearing away of the highway there came a time when the fire-plug projected some half-inch above the surface. The plaintiff fell over the plug and was injured. It was held by the Court of Appeal, consisting of Lord Esher M.R. and Lindley and Lopes L.JJ. that, the accident not being due to any want of repair in the plug the defendants were under no liability. The rights of the public were not greater than they would have been if the road had been dedicated with the plug already there : *Fisher* v. *Prowse.* (2) This case appears to me to be directly in point, and I see no reason for dissenting from the conclusion come to by the Court of Appeal.

I am of opinion, therefore, that the appeal ought to be allowed.

LORD SUMNER. My Lords, this appeal is about a post in the middle of a road outside the appellants' Marylebone terminus, into which one night the respondent managed to drive his cab. He was driving at six or seven miles an hour, though it was so dark that " he could not see the post until he hit it." The whole question is

(1) 17 Q. B. D. 462. (2) 2 B. & S. 770.

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whether s. 31 of the Great Central Railway Act, 1902, impliedly obliges the railway company to make their gate posts visible to members of the public by some reasonable means or other in spite of the extreme darkness ordained by the Lighting Reduction Orders. It is clear that no such obligation is imposed in express terms.

If the case were not governed by the statute, the inquiry would have been whether the structures therein mentioned, including, as seems to be agreed, the post in question, had or had not been erected before the thoroughfare in which they stand was dedicated for the use of the public as a highway. If they had, the respondent must have taken that highway as he found it; if they had not, his action, so far as nuisance was concerned, was undefended. In neither event would the appellants' care or want of care have been material. The question would have been simply nuisance or no nuisance, though in the former event the plaintiff's own negligence would have afforded a defence, if he were proved to have fouled the post through his own carelessness.

How, then, does a question of negligence arise on the statute which could not have arisen at common law? The area in question was virtually dedicated as a public thoroughfare by the Manchester, Sheffield, and Lincolnshire Railway (Extension to London, &c.) Act, 1893, s. 91. Thereafter the appellants erected structures there, and in 1901 they accepted the decision of Bigham J. that these structures were a public nuisance. In 1902 they obtained the enactment of s. 31 in question. That section legalized their nuisance and relieved them of all obligation to abate it. It simply gave permission to maintain the gates and posts and from time to time, when necessary, to renew and replace the structures.

It was admitted (rightly, I doubt not) that if repairs or renewals become necessary, they must be executed with reasonable diligence, and that in executing them due care must be used for the protection of members of the public; but up to the time of this accident no necessity for renewal or replacement, whatever those terms may include, appears to have arisen. The railway company were not the lighting authority for this area, nor were they under any express obligation of that kind. Under the Lighting Reduction Orders the light had been so reduced that the posts were practically invisible, and so the appellants had left them. It

is not suggested that the lighting authority were in default; the case is one in which one party lawfully maintains in a highway something which is capable of becoming dangerous to the public unless another party takes steps to avert that danger, but where those steps have not been taken, and so it is analogous to *Moore* v. *Lambeth Waterworks Co.* (1), a case which, unfortunately, was not brought to the attention of the Court of Appeal. Whether, as in that case, the danger becomes operative through negligent omission by the party who ought to have averted it, or, as here, it becomes operative under circumstances that excuse or justify that omission, cannot be material to the obligations of the party who lawfully maintains the structures in the highway. In either case he is free. I think that decisions on the liability of those who maintain structures adjoining a highway which become dangerous to those who use it are not now in point. As little are the cases where undertakers invite the public to enter and use their undertaking, whether for reward or not, and are in consequence held bound to see that it is free from traps and hidden dangers.

The analogy which led the Court of Appeal to decide for the respondent was that of *Rex* v. *Pease* (2), *Vaughan* v. *Taff Vale Ry. Co.* (3), and *Geddis* v. *Proprietors of Bann Reservoir.* (4) With great respect I think it was inapplicable on two grounds. In the first place, those are cases where the Legislature had authorized undertakers to do overt acts which in the natural course of things were likely to prejudice members of the public. The present is a case in which, without any action at all, the respondents were authorized to leave something undone, namely, the abatement of what previously had been a nuisance. They were merely to maintain a status quo, the natural results of which could not prejudice anybody, for if the place was lighted, no one ought to run into the post at all, since he could see it, and if, owing to fog for example, the place was in darkness, no one ought to be injured by the post, since he had no business to drive so fast as to be damaged if he did run into it. In the second place, in such cases the authority in question is given in general terms; it is, for example, authority to work railways and to run railway trains in the undertakers' discretion; hence it is reasonable

(1) 17 Q. B. D. 462.
(2) (1832) 4 B. & Ad. 30.
(3) 5 H. & N. 679.
(4) 3 App. Cas. 430.

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to infer that the Legislature, in using such general terms, and in authorizing for the undertakers' benefit what would otherwise be a nuisance, meant them to exercise their authority with reasonable care, and not without it. Here the authority is specific and precise: the thing authorized is not an activity at all; the section leaves the railway company no selection or choice. It tells them to let things alone, and I do not think that in 1902 any one could have formulated in intelligible terms the alleged duty to use care in regard to maintaining these posts in this road, or have given a concrete instance of the danger anticipated that would not have seemed fantastic.

My Lords, I am accordingly of opinion that this appeal ought to be allowed, and that the judgments of both Courts below should be set aside and that judgment should be entered for the defendants. The railway company, seeking a decision on this Act of Parliament, forbore to press contributory negligence at the trial and at your Lordships' Bar, and disclaimed any order in their favour either as to costs or to repayment of the damages which the plaintiff had recovered. The appeal should therefore be allowed without costs.

LORD WRENBURY. My Lords, the respondent has recovered against the Great Central Railway Company judgment for damages for negligence. The company appeal. The whole question is whether in the matter in which the respondent alleges that the appellants were negligent they owed any duty. In my opinion they did not.

The post with which the plaintiff came in collision was erected by the appellants some time before 1900. It was an obstruction in the highway. An action was brought against the appellants in the year 1900, and in that action it was decided that the post was an illegal obstruction. In the year 1902 the appellants obtained an Act which authorized them to maintain the post and from time to time when necessary to renew and replace it in the same site and position. The authority was not an authority to do anything actively (except as regards renewal and replacement, upon which nothing turns), but a mere authority to leave things alone. The word "maintain" in the section means no more than "not remove." The result is that that which theretofore was an illegal obstruction became a legal obstruction. For greater accuracy the word "obstruction" (which implies something which improperly interferes with the rights in the high-

way) ought to be dropped. The post was no longer an obstruction to the highway. The legal highway was a road in which there stood a post. Whoever used the highway must use it as a highway with a post in it.

On a dark, rainy night the plaintiff drove his taxicab into the post and suffered injury. Owing to the lighting (or more accurately the darkening) regulations due to the war the street was insufficiently lighted. The appellants were not the lighting authority. They owed no duty in that character. But they were negligent, so the plaintiff contends, because in maintaining the post they were laying a trap in the highway, or because they did not take reasonable steps to disclose the presence of the post, say, by painting it white or putting a red lamp upon it.

My Lords, no one disputes the general proposition that a person who is clothed with a statutory power to do an act must in doing it exercise reasonable care to prevent injury to others. But in the present case the statutory authority was not to do an act, but to leave things as they were. In 1902 the post was in the highway illegally. The statute of 1902 said you may leave it where it is. It thus became a post in the highway legally. The authority was not an authority to be active, but to be passive. The Act merely released an obligation, namely, the obligation not to obstruct the highway. From that state of facts no duty flows. If there be duty or authority to do an act it is possible to be negligent in doing it. If there be duty or authority to do or to abstain from doing an act according to circumstances it is possible to be negligent in doing or abstaining from doing it. But if the duty or authority be simply not to do an act—merely to leave things as they are—it is impossible to be negligent in not doing anything. The last is the present case.

It is said, however, that "maintain" is not merely passive, but implies also something active, namely, doing acts of maintenance. This may be true, but it is not necessary to inquire whether it is or not. For the words of the statute, "renew and replace," plainly authorize affirmatively such acts to be done. I agree that in acts of renewal or replacement the appellants might be guilty of negligence. But they have done no such acts. Their only act has been to leave the post as it was.

I do not find it necessary to review the authorities which were

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cited. The respondent principally relied on *Manley* v. *St. Helens Canal and Ry. Co.* (1) The authority there was to do an act, namely, to make a bridge. The company made a swivel bridge which was dangerous, because when opened it left a chasm in the highway. A subsequent Act empowered the company to maintain the bridge. It was argued that the result was a legislative declaration that this was a perfect bridge and that the company owed no duty to guard against danger when the bridge was opened. Channell B. supplied the answer, namely, that as it was a bridge liable to be opened, the company were bound to take precautions against danger when it was opened. There is no similar consideration in the case of this post. The present case is like that of the fire-plug in *Moore* v. *Lambeth Waterworks Co.* (2), as to which Lindley L.J. said : " The plug itself was not out of repair, and there was nothing the matter with it. It had not grown ; it had not changed in any way." There is a passage just below with which I entirely agree and which may well conclude this present opinion. " It is said that at common law, if anyone maintains something in a highway, he must take care that it is not a nuisance, and does not obstruct the traffic. I think that, as a universal proposition, that is not true, as is shewn by those cases where high roads have been dedicated subject to obstruction ; and I am not able to find any authority which goes the length of deciding that a person who is authorized or compelled by Act of Parliament to put a thing in the highway, is bound to do more than the statute requires him to do." This becomes a fortiori when the Act did not authorize putting a thing in the highway but authorized the retention of a thing already there.

In my judgment this appeal must be allowed and the action dismissed. The appellants do not ask for costs.

Order of the Court of Appeal reversed and judgment entered for the appellants.

Lords' Journals, July 28, 1916.

Solicitor for appellants : *Dixon H. Davies.*
Solicitors for respondent : *Oswald Hickson & Field.*

(1) 2 H. & N. 840. (2) 17 Q. B. D. 462, 469.

[HOUSE OF LORDS.] H. L. (Sc.)*

LOVE AND STEWART, LIMITED . . . . APPELLANTS; 1916

AND *July* 25.

ROWTOR STEAMSHIP COMPANY, LIMITED RESPONDENTS.

Ship — Charterparty — Construction — Written Words introduced into Printed Clause—Repugnancy—Demurrage—Reference to Custom of Port as modifying Stipulation as to Rate of Discharge—Despatch Money—Effect on Charterparty framed in "reversible" Terms—Principal and Agent—Authority—Estoppel.

A charterparty provided that a cargo of pit props was "to be loaded *at the rate of* 125 *fathoms daily* and discharged *at the rate of* 125 *fathoms daily reversible* with customary steamship despatch, as fast as the steamer can receive and deliver, during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted." The words in italics were interlined in writing; the rest of the clause was printed. "Reversible" signified that any time saved in loading might be added to the time allowed for discharging and vice versa. The daily rate was equivalent to thirteen days for loading and thirteen days for discharging.

When the ship arrived at the port of loading the master of the ship entered into an agreement with the shipper (who was also the vendor) of the cargo that an allowance for "despatch money" should be made to the shipper for each day saved in loading. The ship was loaded in nine days, and accordingly despatch money for four days was deducted from the freight. In respect of this purchase of four days by the master the bill of lading contained the statement "thirteen days used for loading." This bill was indorsed to the charterers, and they in knowledge of the transaction between the master and the shipper took delivery of the cargo under the bill. The ship took 17½ days in discharging the cargo, allowing for Sundays and holidays. By the custom of the port of discharge the discharge of pit props was suspended during wet weather and during half of each Saturday, and if the custom of the port applied the ship was discharged in thirteen days. In an action for demurrage incurred in the discharge of the cargo :—

Held, (1.) (affirming the decision of the Second Division of the Court of Session in Scotland), on the principle of *Postlethwaite* v. *Freeland* (1880) 5 App. Cas. 599 and *Hulthen* v. *Stewart & Co.*

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* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD WRENBURY.

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[1903] A. C. 389, that the parties intended to contract on the basis of a fixed number of lay days and that the reference to the custom of the port was inconsistent with that intention, and consequently that the time during which the weather was wet and the half of each Saturday could not be deducted; (2.) (reversing the decision of the Second Division) that the shipper had no authority from the charterers to alter the charterparty by selling the four days saved in the loading to the ship, and that the charterers were not estopped by the false statement in the bill of lading from claiming on the discharge under the word "reversible" the four days saved in the loading; that consequently they were liable for demurrage for one half-day only.

Interlocutor of the Second Division of the Court of Session in Scotland, 1916 S. C. 223, discharged.

APPEAL against certain interlocutors pronounced by the Lord Ordinary and the Second Division of the Court of Session in Scotland (1) in an action raised by the respondents for payment of 305*l.* 15*s.* 5*d.* for demurrage.

The respondents were the owners and the appellants were the charterers of the steamship *Glamorgan*.

By a charterparty in the form of the Chamber of Shipping Wood Charter (Scandinavia and Finland) to the United Kingdom, 1899, between Messrs. Jenkins Brothers of Cardiff, as agents for the respondents, and the appellants, dated June 11, 1912, it was agreed that the *Glamorgan* should proceed to "one or two places Kristinestad . . . . and there load . . . . from the agents of the said charterers a full and complete cargo consisting of short props maximum 9 ft. length . . . ." for "Cardiff, Barry or Newport as ordered." The charterparty contained a memorandum in the margin opposite clause 3 as follows: "Owners may arrange for a fixed average number of standards per day for loading and/or discharging," and this option was exercised by the respondents.

Clause 3 provided as follows: "The cargo to be loaded *at the rate of* 125 *fathoms daily* and discharged *at the rate of* 125 *fathoms daily reversible* with customary steamship despatch, as fast as the steamer can receive and deliver, during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and

(1) 1916 S. C. 223.

discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging demurrage shall be paid *at the rate of* 5*d. per net registered ton* per day, and pro rata for any part thereof." The words in italics were in manuscript, the rest of the clause being in print.

The charterparty further provided (clause 4) that sufficient cash for steamer's ordinary disbursements should be advanced to the master, if required by him, at the port of loading. In the margin of the charterparty the master was directed to apply for cargo to Geo. W. Easton, Wiborg, Finland.

The master having applied to Easton was directed by him to apply to Erland Grankull, Kristinestad, from whom the appellants had purchased the cargo.

The loading of the *Glamorgan* commenced on July 1, 1912, and finished on July 10, the time occupied (excluding an intervening Sunday which was not used) being accordingly nine days. The cargo consisted of 1613 fathoms, and at the average rate provided for in the charterparty thirteen days were available for loading. The steamer was accordingly loaded in four days less than the time provided for in the charterparty. An arrangement was, however, made between the master and Erland Grankull, the shipper, without, as the appellants alleged, any authority from them, whereby the master agreed to pay Grankull the sum of 31*l.* 10*s.* in respect of $3\frac{1}{2}$ days saved in loading, being at the rate of 9*l.* per day. The method by which the payment was made was by adding this sum to the amount of the ship's disbursements. Mr. M'Kerrachar, who was an assistant of Mr. Easton's, superintended the loading at Kristinestad on behalf of the appellants. He first heard of the arrangement between Grankull and the master when the bill of lading came to be signed, and at the request of the master he inserted in the margin of the bill of lading "thirteen days used for loading." The bill of lading also contained a receipt on account of advance freight for 467*l.* 15*s.* 6*d.*, which included the sum of 31*l.* 10*s.* Thereupon M'Kerrachar communicated with Easton and in consequence of instructions received from Easton obtained from Grankull a certificate that the cargo had been loaded in nine working days. This certificate was received by the appellants together with the bill of lading.

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The *Glamorgan* arrived at Newport on July 18 and commenced discharging on July 19, but she was not discharged until midday on August 9. Allowing for Sundays and the August Bank Holiday the time occupied by the appellants in taking delivery of their cargo was 17½ days. In the condescendence the time was stated to be 19½ days, and the respondents accordingly claimed for 6½ days' demurrage.

Two questions were raised by the action—1, as to the construction of clause 3 of the charterparty, and 2, as to the effect of the above stated arrangement. It was admitted by the respondents (1.) that the customary use of the word " reversible " in charterparties in the shipping trade was to signify that if any time were saved in loading cargo such time was to be added to the time allowed for discharging and vice versa, and (2.), in effect, that according to the custom of the port at Newport the discharge of Baltic pit props was suspended during wet weather and during the half of each Saturday ; and that if Sundays and holidays and the time during which the work of discharging the *Glamorgan* was suspended owing to wet weather and Saturday half-holidays were deducted from the period covered by the discharge the total working time occupied in discharging the ship was thirteen days.

Upon the first question the respondents maintained that the written words in clause 3 overruled and nullified the printed words immediately following, namely, " with customary steamship despatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports." The appellants on the other hand maintained that the words " but according to the custom of the respective ports " were not inconsistent with the written matter and that regard ought to be had to the custom of the port at Newport.

Upon the second question the appellants' manager, Mr. William Reid, stated in his evidence that Grankull had no authority from the appellants to alter the charterparty by accepting 9*l.* per day for despatch money, and that the appellants did not know at the date when they presented the bill of lading and accepted delivery of the cargo under it that the 467*l.* 15*s.* 6*d.* included the 31*l.* 10*s.*, though they knew that Grankull had been paid that sum by the master.

The Lord Ordinary (Lord Hunter) upon the first point held that the respondents by exercising the option conferred by the charterparty had substituted a fixed number of days for loading and discharging as opposed to a number that might vary according to the circumstances in which the loading or discharging was to take place. He therefore held that the respondents' construction was the right one. Upon the second point he came to the conclusion on the evidence that Grankull in making the bargain with the master had no authority to act on behalf of the appellants, and he held further that the appellants were not bound by the false statement in the bill of lading. In the result, owing to some miscalculation, he held that the respondents were entitled to $2\frac{1}{2}$ days' demurrage.

The Second Division (the Lord Justice-Clerk, Lord Dundas, Lord Salvesen, and Lord Guthrie) agreed with the Lord Ordinary upon the first point but differed from him on the second point, and held that the respondents were entitled to $6\frac{1}{2}$ days' demurrage as claimed.

1916. June 27, 29, 30. *Condie Sandeman, K.C.*, and *Douglas Jamieson* (both of the Scottish Bar), for the appellants. 1. Upon the true construction of clause 3 of the charterparty delivery is to be at the rate of 125 fathoms per day—that is to say, delivery is to be effected in thirteen days, but only during working hours and according to the custom of the port: *Cochran* v. *Retberg.* (1) The two leading cases on this branch of the law, *Postlethwaite* v. *Freeland* (2) and *Hulthen* v. *Stewart & Co.* (3), are not inconsistent with the appellants' contention if the meaning of this clause is not an absolute contract for a given number of days but a contract qualified by the custom of the port. Where there is a repugnancy between the written and the printed matter of a contract the written matter is to prevail, but there is here no inconsistency between the written matter and the words "but according to the custom of the respective ports," &c. The only words which require to go out are "with customary steamship despatch as fast as the steamer can receive and deliver." Then it is held by the Second Division that the custom referred to in clause 3 related only to the manner of the discharge and

(1) (1800) 3 Esp. 121. (2) 5 App. Cas. 599, 608.
(3) [1903] A. C. 389.

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did not apply to time, but that is contrary to *Brown* v. *Johnson* (1); *Nielsen & Co.* v. *Wait James & Co.* (2); *Horsley Line* v. *Roechling Brothers.* (3) In *Gardiner* v. *Macfarlane, M'Crindell & Co.* (4) the dicta of the learned judges on this point are conflicting, but it was there held that the custom was not proved. In *Castlegate Steamship Co.* v. *Dempsey* (5) the words " with all dispatch as customary " were held to refer primarily to the manner of discharge and secondarily only to time, but the Court was not there considering whether there might be a custom relating entirely to time. Here the custom of the port covers not only half-days and holidays but also wet days, and holidays include Saturdays pro tanto—that is to say, Saturday is to be taken as a half-day. That fractions of a day may be looked at in a charterparty is shown by *Yeoman* v. *Rex* (6) and *Horsley Line* v. *Roechling Brothers.* (7)

2. As to the arrangement between Grankull and the master, Grankull was the agent of the appellants only for the purpose of providing the cargo. He had no authority from the appellants to alter the charterparty by selling the four days, and the appellants are not estopped by the false statement in the bill of lading " thirteen days used for loading " from claiming the benefit of the term " reversible " in the charterparty.

R. S. Horne, K.C., and *Charles E. Lippe* (both of the Scottish Bar), for the respondents. 1. As to the question of construction; there are two classes of charterparty. In one class the discharge is to be taken within a given number of days. That admits of no exception in the absence of special qualifications. In the other class the discharge is to be with customary steamship despatch. That entitles the charterers to plead extenuating circumstances: *Postlethwaite* v. *Freeland* (8); *Hulthen* v. *Stewart & Co.* (9) This charterparty as written in falls under the former class. In construing a printed form with written words superadded the method is to see what can remain consistently with the written-in terms and so far as there is any inconsistency to give preference to the written words:

(1) (1842) 10 M. & W. 331.
(2) (1885) 16 Q. B. D. 67.
(3) 1908 S. C. 866, 869, 876.
(4) (1893) 20 R. 414, 418, 426.
(5) [1892] 1 Q. B. 854, 859, 861.
(6) [1904] 2 K. B. 429, 432.
(7) 1908 S. C. 866.
(8) 5 App. Cas. 599.
(9) [1903] A. C. 389.

Robertson v. *French* (1); *Scrutton* v. *Childs* (2); *Gray* v. *Carr.* (3) Here the rate of 125 fathoms daily is substituted for "customary steamship despatch," and those words at least must be disregarded. Then as to the words "according to the custom of the respective ports." Those words qualify only the clause immediately preceding them, i.e., the working hours, and must also go out. The intention of the clause as written in was to substitute a definite fixed time, Sundays, &c., excepted, for the previous clause, and therefore the custom of the port has not been incorporated in this charterparty. But further the custom of the port refers only to the method and means of discharge and does not fix the time at all: *Dunlop & Sons* v. *Balfour, Williamson & Co.* (4); *Castlegate Steamship Co.* v. *Dempsey* (5); *Gardiner* v. *Macfarlane, M'Crindell & Co.* (6) In such a case as this the custom of the port does not bring in wet weather days because that has been already dealt with: *British and Mexican Shipping Co.* v. *Lockett Brothers & Co.* (7); *Holman* v. *Peruvian Nitrate Co.* (8) In *Brown* v. *Johnson* (9) Lord Abinger explains the meaning of "day" in a manner favourable to the respondents. He says "days" and "running days" mean the same thing, namely, consecutive days. Then as to Saturdays; Saturday is not a holiday but a working day, and it is treated as a whole day: *The Katy* (10); *Central Argentine Railway* v. *Marwood.* (11)

2. As to the question of the despatch money, the appellants pay less than they otherwise would have done for freight and they cannot both approbate and reprobate the transaction. They cannot approbate the payment and reprobate what the payment was for. This is the ordinary case of estoppel: *Freeman* v. *Cooke.* (12) The fact represented was that the ship had paid to the charterers moneys for four days' despatch, and the necessary effect of that was to limit the amount of time in a charterparty framed in reversible terms available at the port of discharge. The captain purchased four

(1) (1803) 4 East, 130, 136.
(2) (1877) 36 L. T. 212.
(3) (1871) L. R. 6 Q. B. 522, 536.
(4) [1892] 1 Q. B. 507, 518.
(5) [1892] 1 Q. B. 854, 861.
(6) 20 R. 414, 426.
(7) [1911] 1 K. B. 264, 284.
(8) (1878) 5 R. 657.
(9) 10 M. & W. 331.
(10) [1895] P. 56, 63.
(11) [1915] A. C. 981.
(12) (1848) 2 Ex. 654.

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days at Kristinestad in order to get all the advantages which would arise from that purchase in the case of a charterparty framed in reversible terms. The four days came out of the whole period of twenty-six days allowed for loading and discharging. [They referred to *Holman* v. *Peruvian Nitrate Co.* (1); *Oakville Steamship Co.* v. *Holmes* (2); *Nelson & Sons* v. *Nelson Line, Liverpool* (3); *The Glendevon* (4); *Laing* v. *Hollway* (5); *Steamship Calcutta Co.* v. *Andrew Weir & Co.* (6); *Gullischen* v. *Stewart Brothers.* (7)]

LORD PARKER OF WADDINGTON having intimated that their Lordships did not require to hear a reply on the question of the despatch money,

Condie Sandeman, K.C., replied on the question of construction.

The House took time for consideration.

July 25. LORD PARKER OF WADDINGTON. My Lords, in this case I have had the advantage of reading and I agree with the opinion about to be read by my noble and learned friend Lord Sumner. To that opinion I desire to add nothing.

LORD SUMNER. My Lords, the defenders, Messrs. Love and Stewart, Limited, by a contract dated October 21, 1911, bought from Erland Grankull, of Kristinestad in Finland, a large parcel of pit props for delivery in the following season, f.o.b. at Kristinestad, by steamers which they would provide for the purpose. Payment was to be by bill at sight in Glasgow for the invoice amount against indorsed bills of lading. There was a further term for Grankull's benefit, that the ship should clear with him or his agents and also employ his stevedores, paying him for the services rendered.

To provide for the carriage of part of this parcel Messrs. Love and Stewart, Limited, chartered the pursuers' steamship *Glamorgan*, by a charter dated June 11, 1912. It was in the well-known "Scanfin" form with some manuscript alterations. In particular, clause 3, the lay day and demurrage clause, was altered by interlineating after "loaded" the words "at the rate of 125 fathoms

(1) 5 R. 657.
(2) (1899) 5 Com. Cas. 48.
(3) [1907] 2 K. B. 705.
(4) [1893] P. 269.
(5) (1878) 3 Q. B. D. 437.
(6) [1910] 1 K. B. 759.
(7) (1884) 13 Q. B. D. 317.

daily," and after "discharged" the words "at the rate of 125 fathoms daily, reversible." None of the printed words as to loading were struck out and no question of mistake or of rectification has been raised. The ship loaded and discharged a quantity of pit props, which at the agreed rate gave thirteen days each at the ports of loading and discharge respectively. She was ordered to Newport, Monmouth, and there discharged her cargo to Messrs. Love and Stewart, Limited.

The question which arises on this clause relates to wet days and Saturday half-holidays. The pursuers admitted that "according to the custom of the port at Newport, Monmouth, the discharge of Baltic pit props is suspended during wet weather and during the half of each Saturday." The question is whether on the words of the charter the time when the discharge of the *Glamorgan* was suspended for these reasons counts as laying time against the receivers of the cargo.

My Lords, I think that the parties have manifested a clear intention in the charter to contract on the basis of a fixed number of lay days, for discharge at a daily rate enables the number of lay days to be fixed as soon as the quantity of the cargo is known, and is equivalent to fixing the number of lay days beforehand. The clause, having begun with the expression of such a stipulation, then proceeds in the words of the form, words which refer to the custom of the port and to the circumstances of the shipowner and his ship and of the receiver and his appliances as they happen to exist at the particular port at the time of the loading or discharge as the case may be. Your Lordships' House placed an interpretation on these printed words in *Hulthen* v. *Stewart & Co.* (1) which is not only final in law but is exceedingly well known among all persons concerned in chartering steamers in this trade. That decision was in accordance with the earlier decision in *Postlethwaite* v. *Freeland.* (2) In view of those cases I think it is so clear that these printed provisions for lay days based on a time which is reasonable under all the circumstances stand in antithesis to lay days based on a number of days fixed or capable of being fixed, such as the written words provide for, as to make it impossible in the present case to give effect to both sets of words as measures of the time allowed

(1) [1903] A. C. 389. (2) 5 App. Cas. 599.

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for loading and discharging. The intention to have fixed lay days is clear and must prevail. Furthermore, the days which are to be excepted in computing the lay days are the subject of an express provision which is complete in itself. Accordingly, as I think that in view of this circumstance neither the ordinary working hours nor the custom of the respective ports can be availed of to introduce into the fixed lay days further exceptions of days or parts of days, it is sufficient to say that these printed provisions must refer to the manner of discharge for any effect they may have, and that matter need not further be considered.

My Lords, I think that time during which the weather is wet, which is time that may be measured by minutes or by hours, and the half of each Saturday, which though half of a calendar day may not be the same as a moiety of the number of working hours on an ordinary day, cannot be brought within the exception of "Sundays, general or local holidays." They are not days within the exception in the clause. A wet day, even if it rains all day, is not a day in the sense in which Sunday or Monday or Bank Holiday is a day. Consecutive days are running even though rain may prevent the receiver from getting any benefit from them. Saturday afternoons are the more plausible case of the two, but the exception in the charter is clearly based on days, not on parts of days. I do not think the term extends to the latter part of a week-day, on which it is usual not to work, although we all call it and enjoy it under the name of a Saturday half-holiday. Really it is a half-day, which while it lasts is wholly holiday, and I do not think that "general or local holidays" cover it. No case to that effect was cited out of the many cases decided on lay days, and one must remember that this form of words was meant to apply to the varying conditions of a great variety of foreign ports as well as to those of ports in the United Kingdom.

My Lords, at Kristinestad the whole cargo was loaded in nine days, and the effect of the word "reversible" in the charter is that the receivers were entitled to seventeen lay days under the charter for discharging the ship at Newport. The pursuers claim (and the burden is on them) to be able to show that in the circumstances only thirteen days were available for the receiver. The circumstances are these. By a memorandum written in the margin of

the charter the captain was instructed to apply for cargo to a Mr. Easton, of Wiborg. Mr. Easton was the defenders' general agent in Finland, though what the precise limits of his authority may have been we do not know. By him the captain was referred to Mr. Grankull. In loading the cargo Mr. Grankull partly acted on his own account to deliver the pit props on board of a ship of the purchasers' providing in accordance with the contract of sale, partly as the charterers' agent to fulfil their charter obligations to load a full cargo and to make advances on account of freight for ship's disbursements, and partly as the ship's agent to report and clear her at the custom-house at Kristinestad, to do her business generally, and particularly to engage her stevedores, all for some moderate fees to himself.

As is very commonly done, the captain and Grankull made an arrangement for a payment to the latter, if he gave the ship despatch. Accordingly he worked overtime, saved four days on the total of thirteen which the ship was bound to allow him under the charter, and earned 31*l.* 10*s.* If the captain had carried 40*l.* or 50*l.* about with him in cash he might have paid the money then and there. Instead, the amount was, by agreement, included in the ship's disbursements and brought up the sum of 436*l.* 5*s.* 6*d.* disbursed for customs and port dues, stowage and so forth, to a total of 467*l.* 15*s.* 6*d.* The captain was to acknowledge this sum to have been received by him under the charter as an advance on freight to be earned on the voyage. In substance, having to pay Grankull 31*l.* 10*s.* for himself, he did so by borrowing the money for the purpose from Grankull as the charterers agent under the charter to advance money for ship's disbursements at the port of loading. He then enabled Grankull to obtain the money for himself from the defenders by including it in the sum acknowledged by him on the bill of lading as advance freight, and Grankull in due course included in his invoice for the timber sold the sum of 467*l.* 15*s.* 6*d.* advanced for disbursements, and his bill for the total amount was duly met by the defenders on taking up the bill of lading.

My Lords, what is the effect of this? The captain, using a familiar phrase, says that Grankull "sold" him the four days, and when the bill of lading came to be made out he wished to write in the margin "thirteen days left for discharging," pursuant to

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instructions from his owners to "try and get under the bill of lading the days left for discharging inserted in the margin." A Mr. M'Kerrachar, a clerk of Mr. Easton's, whose business had been to superintend the loading in the interest of the defenders, was present when the bill of lading was completed and successfully stood out for the words "thirteen days used for loading." They were written, seemingly by M'Kerrachar himself, in the margin of the bill of lading but not among the words which express a contract of carriage. The bill of lading incorporated the charter, of which the captain had a copy.

There is no evidence that M'Kerrachar had any authority or purported to have or to exercise any authority to bind the defenders in this matter. The insertion of the note in the bill of lading evidenced no new bargain with the captain. His bargain for despatch money had been made with Grankull some days before. Grankull had no authority to make any variation of the terms of the charter so as to bind the defenders, and as far as we know he purported to act on his own behalf. The captain says he looked on him as the defenders' agent, but, having the charter before him which showed the scope of the authority, such as it was, he could not rely on any ostensible authority ultra, even if Grankull had purported to act for the defenders in the matter, which was not the case. It is said that if the days "bought" from Grankull were to be added to the defenders' days at Newport, the captain was throwing his owners' money away, for they might have to "buy" them over again at the port of discharge, and that was plain to the captain, to Grankull and to M'Kerrachar at Kristinestad, and must have been plain to the defenders too at Newport. There is some truth in this. If the defenders had insisted on their pound of flesh they might have detained the ship at Newport for seventeen days, when thirteen would have sufficed, or have extorted more despatch money as the price of earlier discharge, but there is no evidence that this was feared on the one side or intended on the other. If they did not, despatch at Kristinestad was worth money to the ship, for this might be the saving of another open water voyage to the Baltic in the autumn, and in any case four days of the steamship's time somewhere were saved. The bargain itself evidently did not purport to include as a term that there should only

be thirteen days for discharging, for the captain was only to "try" to get this on the bill of lading. He failed, and the statement put on it was incorrect to the knowledge of all parties, nor did it operate as an admission against the defenders, for M'Kerrachar had no authority to admit anything.

My Lords, I think that what occurred at Kristinestad in itself effected no alteration of the defenders' rights under the charter. At Newport they presented the bill of lading, knowing by that time from M'Kerrachar's letters that some despatch had been given and paid for, but not the number of days nor the price, and knowing also that the advance freight came to 467*l.* 15*s.* 6*d.*, but not how the disbursements were made up. They knew that the note on the bill of lading as to days used was wrong but not how far it was wrong. They drew no attention to the matter on presenting the bill of lading. The witness who gave this evidence was expressly accepted by the Lord Ordinary as truthful. As was natural, the balance of freight was not paid in one sum but in instalments as the discharge proceeded. The first payment of 350*l.* was on August 1, the twelfth lay day; there were several other payments on account, and the balance, partly made up of 467*l.* 15*s.* 6*d.*, the advance of freight for disbursements at Kristinestad, was only settled on August 18, nine days after the end of the discharge.

It is suggested by the pursuers that in some way the defenders are barred by this conduct from disputing that thirteen days were in fact used at Kristinestad, and from disputing that Grankull had authority to sell four days for them for 31*l.* 10*s.*, which he kept for himself. In the alternative it is suggested that in presenting the bill of lading without protest and in taking the benefit of the amount of 467*l.* 15*s.* 6*d.* as an advance of freight the defenders either ratified what was done at Kristinestad or approbated it in part, namely, the advance of 31*l.* 10*s.* to the captain by Grankull as their agent, and must approbate the transaction in whole or not at all.

My Lords, with all respect to the learned judges with whom these considerations prevailed, I think the arguments are unfounded. Grankull did not purport to act for the defenders, so there can be no ratification. If the presentation of the bill of lading could be treated as a representation by the defenders to the pursuers that

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thirteen days had been used at Kristinestad, it was a representation as to which the pursuers knew the truth, and they did not act or change their position on the faith of it. When the defenders took the benefit of the alleged advance of freight up to 467*l.* 15*s.* 6*d.* the present dispute as to lay days at Newport was in full swing. They had, in fact, allowed Grankull that amount as money advanced for ship's disbursements and they declined to pay any more freight to the shipowners. Whether they need have paid Grankull or not is a matter which cannot affect the shipowner's rights : that could only be done by some bargain binding between the defenders and the pursuers. Grankull found the captain the money with which to pay for despatch, not in a cash loan, but by an entry in an account, which was intended to be available to the defenders, as in fact they have availed themselves of it, but it was not accompanied by any agreement binding on them that they should be prejudiced in respect of discharging time.

Furthermore, in presenting the bill of lading the defenders merely did what they must needs do in order to get delivery of their cargo. They received it from Grankull under the contract of sale as the symbol of the delivery of goods while afloat. Nothing had occurred by which any contract for the carriage of the goods arose between them and the shipowners other than the charter itself. No new bargain had been made, under which the pursuers carried for the defenders under a bill of lading instead of a charter. The freight earned was chartered freight and the bill of lading in the defenders' hands was only the ship's receipt for the goods. This is the ordinary effect of documents such as these under such circumstances, and the cases cited do not bear upon them.

My Lords, in the result the defenders were entitled to seventeen, not thirteen, lay days at Newport. As they cannot except days when it rained and Saturday afternoons, the ship was on demurrage, but for half a day only, and not, as the Lord Ordinary held, for two and a half days, or, as was held on appeal, for six and a half. I think, therefore, that this appeal should be allowed with costs ; that the interlocutor appealed from should be discharged with costs here and below ; and that the interlocutor of the Lord Ordinary should be restored with the substitution only of 23*l.* 10*s.* 5*d.* for the sum of 117*l.* 12*s.* 1*d.* which he awarded.

LORD WRENBURY. My Lords, I agree with the opinion delivered by my noble and learned friend and I have nothing to add.

Interlocutor of the Second Division of the Court of Session in Scotland discharged and interlocutor of the Lord Ordinary varied by striking out the words " $2\frac{1}{2}$ *days" and also the words "* 117*l.* 12*s.* 1*d.*" *and by inserting in lieu thereof the words "one half-day" and also the words* 23*l.* 10*s.* 5*d. and subject to such variations restored. Respondents to pay the costs of the action in the Second Division of the Court of Session and the costs of the appeal to this House.*

Lords' Journals, July 25, 1916.

Agents for appellants: *Ince, Colt, Ince & Roscoe, for Borland, King, Shaw & Co., Glasgow, and Dove, Lockhart & Smart, S.S.C., Edinburgh.*

Agents for respondents: *Holman, Fenwick & Willan, for Boyd, Jameson & Young, W.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.* 1916 June 23.

CORPORATION OF THE CITY OF TORONTO Appellants;

AND

TORONTO RAILWAY COMPANY . . . Respondents.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO.

Street Railway—Franchise—Grant in Reversion—Construction of Agreement—Confirming Act—Effect on Construction—Street Railway Act (R. S. Ont., 1887, c. 171), s. 18.

The appellants had power to grant to the respondents the privilege of operating street railways in Toronto, but by s. 18 of the Street Railway Act (R. S. Ont., 1887, c. 171) could not grant the privilege for a longer period than twenty years. By an agreement dated September 1, 1891, the appellants granted to the respondents for twenty years, and for a further period of ten years if enabling legislation were obtained, the exclusive privilege of operating street railways in Toronto except in certain localities, including a portion of Yonge Street; it was further provided that over the said excepted portion of Yonge Street the respondents should have an exclusive right to operate street railways so far as the appellants could legally grant the same. Another company had powers over that street which would expire in 1915, namely, more than twenty but less than thirty years from the date of the agreement. The agreement was scheduled to an Act by which it was confirmed, and which by s. 1 purported to declare its effect:—

Held, that the grant of powers over the excepted portion of Yonge Street was not invalid by reason of being a grant in reversion, and that upon the true construction of the agreement it conferred upon the respondents exclusive running powers thereover upon the powers of the other company terminating in 1915.

Held, further, that the declaration in s. 1 of the confirming Act must be taken as merely explaining and identifying the agreement and not as affecting its construction.

Appeal from a judgment of the Appellate Division of the Supreme Court of Ontario (September 27, 1915) affirming an order of the Ontario Railway and Municipal Board.

The appeal related to the construction and effect of an agreement dated September 1, 1891, by which the appellants granted to the

* *Present:* Lord Buckmaster L.C., Earl Loreburn, and Lord Shaw of Dunfermline.

respondents powers to operate street railways in the city of Toronto, and the effect of a statute (55 Vict. c. 99, Ontario) by which that agreement was confirmed.

The facts, including the material provisions of the agreement and confirming statute, are stated in the judgment of their Lordships.

The respondents in August, 1915, applied to the Ontario Railway and Municipal Board for the approval of plans for the extension of their tracks over Yonge Street, and an order was made in their favour. The order was affirmed on appeal to the Appellate Division (Riddell, Kelly, and Latchford JJ.).

Clauson, K.C., and *G. R. Geary, K.C.*, for the appellants. At the date of the agreement another company had exclusive powers over Yonge Street. The appellants could not grant powers in reversion to those previously granted. The agreement only grants powers over Yonge Street so far as the appellants could legally grant them. Under the Street Railway Act (R. S. Ont., 1887, c. 171), s. 18, they could only grant powers for twenty years, but the then existing powers did not terminate till 1915. The confirming Act declares that the grant over the excepted portions of Yonge Street was only of such powers as the appellants possessed at the time of the execution of the agreement, namely, during twenty years.

Their Lordships required to hear the respondents only upon the effect of the confirming Act.

Sir John Simon, K.C., and *D. L. McCarthy, K.C.*, for the respondents. The agreement is scheduled to the confirming Act; the statement of its effect in s. 1 cannot alter the true construction. But in any event s. 1 of the Act does not alter that construction. The agreement granted the rights in Yonge Street from the date when the then holders of the running powers ceased to exercise them; the operative effect of the agreement was extended to thirty years by the confirming statute.

Clauson, K.C., replied.

June 23. The judgment of their Lordships was delivered by

LORD BUCKMASTER L.C. This appeal has arisen out of an application by the respondents to the Ontario Railway and Municipal

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Board, under s. 250 of the Ontario Railway Act (R. S. Ont., 1914, c. 185), asking the approval of plans for a proposed extension of a street railway. The Board made an order in favour of the respondents upon this application on September 9, 1915; from this order the present appellants appealed to the Appellate Division of the Supreme Court of Ontario, by whom the order of the Railway Board was confirmed, and the present appeal is against that judgment.

On the original hearing, certain technical objections were taken on behalf of the appellants, but these were summarily overruled by the Railway Board, who regarded them as devoid of substance or merit. Such objections do not admit of elaborate argument, and, although maintained before the Supreme Court and on the hearing of this appeal, it is unnecessary for their Lordships to deal with them further than by saying they are quite satisfied the decisions of the Board and of the Supreme Court were correct.

The real substance of the dispute depends upon the construction of an agreement made on September 1, 1891, between the appellants and the predecessors in title of the respondents, by which powers were granted for creating street railways over streets within the jurisdiction of the city, and of a statute by which that agreement was confirmed.

The appellants, as the governing body of the city of Toronto, have power to grant rights of running tramways or street railways over all the streets within their jurisdiction, subject to the limitations imposed on their authority by the provisions of the Street Railway Act (R. S. Ont., 1887, c. 171), a statute which provided that no municipal council shall grant to a street railway company any such privilege for a longer period than twenty years. The boundaries of the city have from time to time been altered. In 1884 and up to 1887 the northern boundary extended to a line drawn east and west through the junction of a street known as Yonge Street and the Ontario and Quebec Railway tracks, now the Canadian Pacific Railway. The roads north of this point were, at this date, vested in the county of York, by whom the powers of granting railway rights over these portions of the roads were enjoyed and exercised. By virtue of two agreements, made respectively in 1884 and 1886 between the county of York and the Street Metropolitan Railway Company of Toronto, the county of York, in exercise of such powers,

granted to the Street Metropolitan Railway the right to construct a street railway along Yonge Street, northwards from the northern limit of the city boundary as it was then constituted. These rights were subject to forfeiture in certain events, but, unless forfeited or otherwise extinguished, the rights continued until June 25, 1915.

No doubt whatever has arisen as to the power of the county of York to enter into these agreements, or of the extent or validity of the rights obtained by the Metropolitan Street Railway under their terms, and, indeed, the corporation of the city of Toronto would have had no direct right or interest in the streets at all but for the fact that the municipal boundaries of the city were, in 1887, extended in a northerly direction for an extent of some 1320 feet. The effect of this was to place the portion of Yonge Street and the other streets lying within this extended area under the jurisdiction of the city, and this portion of the roads was accordingly conveyed to the appellants by the county of York, but such conveyance was expressly made subject to all existing rights of the public or any person or corporation, and, in particular, to the rights of the Metropolitan Street Railway in respect of the road known as Yonge Street.

In 1891 the appellants determined to offer for sale the right to operate street railways upon its streets, a tender made by the predecessors in title of the respondents for the purchase of these rights was accepted, and the agreement which has caused this dispute was entered into on September 1, 1891, to carry the purchase into effect. By this agreement the corporation granted to the purchasers for a period of twenty years from the date of the agreement, and a further term of ten years if legislative authority could be obtained for such extension, "the exclusive right . . . . to operate surface street railways in the city of Toronto, excepting on the island and on that portion, if any, of Yonge Street from the Ontario and Quebec Railway tracks to the north city limits, over which the Metropolitan Street Railway claims an exclusive right to operate such railways, and the portion, if any, of Queen Street West (Lake Shore Road) over which any exclusive right to operate surface street railways may have been granted by the corporation of the county of York, and also the exclusive right for the same term to operate surface street railways over the said portion of Yonge Street and Queen Street West (Lake Shore Road) above indicated, so far

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as the said corporation can legally grant the same." This agreement was, as is shown upon its face, in excess of the powers of the corporation, and the necessary statute for its confirmation was obtained on April 14, 1892. On June 25, 1915, the rights of the Metropolitan Street Railway ceased over that portion of Yonge Street which was brought within the boundary of the city in 1887, and the respondents accordingly claimed that, by virtue of their agreement, they were then entitled, for the residue of the term which such agreement created, to use this portion of the street for the purpose of their railway. The appellants deny that the agreement conferred any such right. They assert that at the date of the agreement the corporation had no power legally to grant any franchise over this portion of Yonge Street, and that consequently the only rights that were conferred in respect of this area were those that would have arisen if the grants to the Metropolitan Street Railway, made by the county of York, had for any reason been found to have been invalid and void on September 1, 1891.

Their Lordships are quite unable to take this view. At the date of the agreement no question whatever existed and no doubt had arisen as to the rights possessed by the Metropolitan Street Railway. Such rights were regarded by all parties as valid and subsisting, capable no doubt of termination in certain events, but, unless those events occurred, continuing on to June 25, 1915. Subject to those rights, whatever they might be, and subject to the restrictions imposed by the Street Railway Act of 1887, the municipal authorities of the city of Toronto had full power to deal with the franchise of these roads in such a manner as they thought would best serve the interests of the inhabitants of the municipality. The agreement that was made granted a term of years beyond the authorized period, but it was intended to apply for legislation authorizing this extension, and the agreement must be construed throughout upon the hypothesis that this authority would be, as in fact it was, duly obtained. The grant, therefore, was to run street railways in the city of Toronto for a total period of thirty years, with an absolute exception in respect of the island and a limited exception in respect of those parts of Yonge Street and Queen Street where exclusive rights had been granted by the county of York. So far, however, as the excepted portions of those streets were concerned, a grant for

the same period was made by the corporation, so far as they could legally grant the same—that is, so far as they could legally grant the same if the agreement was effectively confirmed by a subsequent statute. The only colour of explanation that can be given by the appellants of the distinct grant on the part of the city of Toronto over these excepted portions of the street is that to which reference has already been made, namely, that the grant to the Metropolitan Street Railway might be declared to be void ab initio or to have ended before September 1, 1891, a contingency which nobody contemplated and which there was no reason or justification to apprehend. The only meaning, in their Lordships' opinion, which this agreement is capable of bearing is that the grant it contained, which was made for good consideration, was a grant which would take effect whenever such antecedent rights were for any reason to cease.

It has been suggested in argument that such a grant would be beyond the powers of the corporation as creating a reversionary interest in the franchise of the roads. No authority whatever was produced to aid this contention, and their Lordships are unaware of any principle that could be invoked in its support. It is also said that such a power is open to abuse, and so doubtless are all powers enjoyed by municipal authorities, but it would be a wrong and dangerous method of determining the true limits of such powers to consider the mischief their improper exercise might produce.

Their Lordships consider the terms of the agreement itself do not, when once the facts are understood, present any real difficulty. It is the manner in which these rights have been confirmed by statute which gives rise to the only question of uncertainty in the case. This statute is 55 Vict. c. 99 of Ontario. Its description, to which reference is permissible for the purpose of determining its construction, is stated to be an Act to incorporate the Toronto Railway Company and to confirm an agreement between the corporation of the city of Toronto and certain persons called the purchasers. The agreement and the conditions and tenders referred to are set out in the schedule to the statute in the usual way and are declared to be valid and legal and binding upon all the parties. So far as the statute sought to validate and confirm the agreement, nothing further than this was required ; but, as is not unusual in

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statutes of this description, the Act proceeded to explain the effect of the agreement, and it is the difference between the terms in which this explanation is given and the terms of the agreement itself which has caused all the confusion in the case. The actual words which give rise to the difficulty are these: "It is hereby declared that under the said agreement the purchasers acquired and are entitled to the exclusive right and privilege of using and working the street railways in and upon the streets of the said city of Toronto, except that portion of Yonge Street north of the Ontario and Quebec Railway, and that portion of Queen Street (Lake Shore Road) west of Dufferin Street; and that the purchasers acquired and are entitled to such right and privilege (if any) over the said excepted portions of Queen Street and Yonge Street as the corporation of the city of Toronto had at the time of the execution of the said agreement power to grant for a surface street railway."

Now, in the first place, it is remarkable that the island, which was totally excepted from the terms of the original grant, is not excepted at all from the description given in the Act of Parliament, and, if the words of the statute were taken to be those which defined and created the rights of the purchasers, they would be entitled to use the island for the purpose of their street railway, although it had been carefully excluded from the terms of the purchase.

Their Lordships think that in an Act of this description a provision of the nature mentioned is to be regarded rather by way of explanation and identification of the agreement, which has been confirmed, than by way of creation of actual and independent rights. But even if they were to be otherwise regarded, in their Lordships' opinion the statute merely expresses in clumsy and obscure language exactly the same conditions as those expressed in the original agreement. The rights and privileges, if any, over the excepted portion of Queen Street which the city of Toronto at the time and execution of the agreement had power to grant were the rights and privileges which were to commence when the existing franchise ended. It is quite true that if that franchise ran its full length, apart from the Act, there would have been no right or privilege which the corporation could grant at all. But the statute must be read in light of the fact that the agreement was thereby validated, and the right and privilege which the corporation had power to grant at the date of the

agreement must be construed as meaning the right and privilege which the corporation had power to grant, assuming—for this was the whole basis of the agreement—that the agreement itself was legalized. The appellants urge strongly that this gave no effect to the words " if any," and that due effect can only be given to these words by making the assumption that in certain circumstances no such rights or privileges could be enjoyed by the corporation, and this assumption can, they urge, only be satisfied by regarding the grant as one to take effect if the existing grants were void ; but if assumptions are to be made for which there is no warrant in the facts, it would be just as reasonable to assume that the period of the existing grant might cover, or be extended so as to cover, the whole period of thirty years, and in that case the words " if any " would have just as sensible a meaning as on the other hypothesis. In truth, the words are often needlessly used by way of caution, and it would be unreasonable to give them such weight as to destroy the obvious meaning of the statute or document in which they are contained.

The view expressed by their Lordships was that taken by the Railway Board, and in the result by the Supreme Court ; but their Lordships think the appellants were right in urging that the judgment of the Supreme Court did not depend upon any independent investigation of the matter, but that they regarded themselves as bound by a judgment of this Board in a dispute which related to the rights over a portion of Queen Street where a similar question arose, in the case of *Toronto Ry. Co.* v. *Toronto Corporation*. (1) In forming this view their Lordships think that the Supreme Court were in error. The judgment referred to did not proceed upon this basis, but upon a ground entirely independent of whether the grant were made subject to the rights over Queen Street or no.

It is unfortunate that, in these circumstances, their Lordships have not the advantage of the considered opinion of the judges of the Supreme Court in this case, but the judgment of the then Court of Appeal in the case of *City of Toronto* v. *Toronto Ry. Co.* (2) is quite clear upon the kindred question which arises with regard to the portion of Queen Street, and with that judgment their Lordships are in entire agreement.

Throughout this judgment reference has only been made to the

(1) [1906] A. C. 117. (2) (1904) 5 Ont. W. R. 130.

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Yonge Street area, for the question of principle which governs the one governs the other also, and there is no need for separate consideration of the second street. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants : *Freshfields.*
Solicitors for respondents : *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1916 *June* 22.

RIDD MILKING MACHINE COMPANY, LIMITED . . . . . } APPELLANTS ;

AND

SIMPLEX MILKING MACHINE COMPANY, LIMITED . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Patent—Infringement—Claim to Principle—Duty to claim in Clear Terms.

If a patentee desires to claim a general principle as part of his patent, it is his duty to make that claim reasonably clear in the claim as stated in the specification ; it must not be left to be inferred from a general review of the specification, or to be spelt out from ambiguous language used therein.

APPEAL by special leave from a judgment of the Court of Appeal of New Zealand (July 30, 1914).

The appellants brought an action against the respondents in the Supreme Court of New Zealand for infringement of a patent, claiming an injunction, damages, and other relief. The patent related to milk releasers, and was granted to one Armstrong, who assigned by deed to the appellants. The material portions of Armstrong's specification appear from the judgment of their Lordships.

The defendants denied that they had infringed the patent, and

* *Present :* LORD BUCKMASTER, L.C., EARL LOREBURN, LORD SHAW OF DUNFERMLINE, and SIR ARTHUR CHANNELL.

alleged that it was invalid upon the ground that the invention was not useful to the public. After evidence had been given before Edwards J., the case was by consent moved into the Court of Appeal for argument. The Court of Appeal (Sir R. Stout C.J., Edwards J., and Stringer J.) dismissed the action, holding that the principle of equilibrium of pressure, which the appellants contended rendered their patent a master patent, had been previously disclosed in the specification of one Northcott in 1910.

1916. May 12, 15. *Walter, K.C.*, and *J. H. Gray*, for the appellants. The invention described in Armstrong's patent is a master patent, inasmuch as it involves a new principle of using the equilibrium of pressure between the upper and lower vessels to control automatically the operation of the valve establishing communication between the two vessels. The evidence as to Northcott's specification was not admissible ; no point as to that specification was raised on the pleadings, and there was no evidence that it was published before the date of Armstrong's patent. The respondents' apparatus was an infringement of the appellants' patent.

The respondents did not appear.

June 22. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This appeal is from a judgment of the Court of Appeal in New Zealand, dated July 30, 1914. By the judgment appealed against the Court held that the respondents had not infringed the appellants' patent. So holding, the Court found it unnecessary to decide a question raised by the defence as to utility, but an opinion was expressed that the patent was useful. The sole question which is raised on the present appeal is whether there was infringement.

It becomes accordingly necessary to see exactly what is the scope of the appellants' claim. The invention was described generally in the Armstrong specification in this way : "This invention relates to milk releasers whereby milk is automatically delivered from the pipes of milking machines without breaking down the vacuum or stopping milking operations."

The actual claims are four in number. The respondents were

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not represented at the bar of the Board; and their Lordships accordingly had not the advantage of any analysis of these claims from the respondents' point of view. A question might suggest itself as to whether the construction put by the appellants' counsel upon the validity and scope of these claims is correct; but their Lordships find it unnecessary to enter upon this topic, and they confine themselves to the specific argument presented to the Board under one claim, namely, the third. That claim is as follows: "Apparatus of the kind described wherein a vacuum formed in an upper compartment is also formed in a lower compartment upon the rising of a float, thereby obtaining equilibrium, the milk then passing from the upper to the lower compartment and escaping through an outlet valve as set forth."

The view presented was that although the claim is in terms for "apparatus of the kind described . . . . as set forth," yet there was *in gremio* of it something much deeper and more far-reaching, namely, a claim for a principle. This introduces a question much debated in patent law, and their Lordships see no occasion in the present case for canvassing that question. For it appears to the Board that the claim is simply what it appears to be, namely, for the apparatus described. A certain result is, no doubt, said to be reached by this apparatus. It might be possible in very many cases of a claim for apparatus—if the argument presented were sound—to evolve a claim for a principle from a description given of the results achieved, and to maintain accordingly that it was the principle of the invention in that sense which was the real subject of the claim. This is, in their Lordships' opinion, a method of construction of patent claims which is accompanied with serious danger, and their Lordships content themselves with saying that they see no occasion in the present case for resorting to such a method.

As the present Master of the Rolls (then Cozens-Hardy L.J.) said in *Ackroyd & Best* v. *Thomas* (1), "If a patentee desires to claim a general principle it is his duty to make that intention reasonably clear. The Court ought not to be called upon to spell out such an intention from the use of ambiguous language." To which their Lordships would add that if any claim for a principle is made it must undoubtedly appear in the claim as that claim is stated, and must

(1) (1907) 21 Rep. Pat. Cas. 737.

not be left to an inference resting on a general review of the specification, or a general search among the language employed therein for the meritorious element of principle or idea.

The necessity for a clear and definite statement in the claim itself is in the case of an alleged principle all the greater, because whenever it is not the specific apparatus or combination which is claimed, but something underlying or stretching beyond that apparatus, the exact ambit of such a claim would require the strictest scrutiny. Otherwise it is manifest that the scope of the alleged principle might —left nebulous—embrace anything from a law of nature to the most familiar principles of statics or mechanics, and therefore it is clear that the claim said to embrace a principle does especially require articulate and precise statement. If this were not so, the bringing of a general rule or principle within the scope of monopoly might form a serious hindrance to the development of ideas and the progress of invention.

How is the alleged principle expressed in the claim? The language has already been cited. It is quite vain to contend that this is a claim of a general principle for producing by a vacuum an equilibrium of pressure in two vessels. Were a principle so general as that argued for, it is in the highest degree doubtful whether it would be the subject of patent right. Again, however, it is unnecessary to decide that general question; and the only point in the case is whether the respondents' milking machine infringes the appellants' because in it also, like the appellants', a vacuum formed "in an upper compartment is also formed in a lower compartment upon the rising of a float, thereby obtaining equilibrium."

Their Lordships have looked at the drawings and specifications of both machines, and they are of opinion that the respondents' machine is essentially different in the very particular which is the foundation of the appellants' argument from the appellants' machine.

The appellants' machine consists of a closed can divided horizontally into two parts, which may be called the upper and the lower vessels. These are connected by an opening in the partition capable of being closed from below by a valve which swings on a pivot in the lower compartment. Before milking begins, the lower vessel is in contact with the air through a tube which runs outside the can possessing a slide valve. But the upper, when once the aperture

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in the partition is shut, is cut off from the air. As soon as the pump proceeds to exhaust the air, the valve which closes the entrance between the upper and the lower vessel is pressed against and seals this aperture, owing to the pressure of the air in the lower vessel. A vacuum is thus created in the upper vessel alone, which causes the milk to flow from the cow into the upper vessel. Owing, however, to the absence of atmospheric pressure, the weight of the milk is not sufficient to open the valve between the two compartments. Thus the milk rises in the upper vessel alone, and as it rises it lifts a float which by means of a lever closes the aperture through which air finds access to the lower vessel, and at the same time places the upper and the lower vessel into communication through the same pipe which formerly admitted the air. The air contained in the lower vessel is then exhausted ; the pressure which kept the valve closing the connection between the upper and the lower vessel in contact is reduced, the valve falls back, and the milk flows into the lower vessel. At the same time the float descends once more, opening the lower vessel to the outside air, and thus again closing the connection between the two compartments. The milk consequently flows freely out of the bottom vessel, the exit from which is guarded by a simple valve which is only shut when the air in the lower vessel is in process of exhaustion. Thus the cycle recommences and the operations are once more repeated.

In the respondents' machine the apparatus is of a totally different character. Instead of the milk rising in the first instance in the upper chamber, the milk coming in at the top of the vessel flows at once to the bottom and the vacuum pump exhausts equally the air in both compartments, but as the milk rises at the bottom of the receptacle it lifts a float against the opening between the two compartments. A minute aperture in the sides of the lower compartment situated just below the division between the upper and the lower vessel allows air slowly to enter, and the pressure thus obtained upon the surface of the milk tends at once to keep the float fixed against the opening, and provides the necessary pressure to open the valve which closes the exit and to cause the milk to escape. As the milk rises in the upper compartment it in turn lifts a float which exposes an opening in a tube that passes down through the central aperture between the two compartments and thus places the two

compartments once more in aerial contact. The result is that a vacuum is again created in the lower compartment, the air being exhausted much more quickly than it can be replenished through the minute aperture ; the pressure which sustained the float that closed the main communication between the two vessels is relaxed, the float in the lower vessel falls, and once more the milk pours down in the lower vessel and the cycle of operations begins again.

Here and there there may be identity of results, but it is manifest that this apparatus is different in essential particulars from that of the appellants ; and their learned counsel very properly admitted that he could not maintain infringement on the ground of mechanical equivalent.

In their Lordships' opinion, even assuming that there was, as contended, a principle claimed, that principle must be judged of by the words employed in the claim, and if those words are examined and the machines compared it is found that the so-called principle as described by the appellants is quite different from that adopted in the respondents' machine.

Their Lordships do not think it necessary to refer to another machine called Northcott's milking machine, upon the judgment of the Court below with regard to which some criticism was offered. The judgment of the Board is upon the broader ground already stated.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed.

Solicitors for appellants : *Elvy, Robb & Welch.*

[PRIVY COUNCIL.]

J. C.* 1916 *July* 14.

FOWLES . . . . . Appellant;

AND

EASTERN AND AUSTRALIAN STEAMSHIP COMPANY, LIMITED . . . . . Respondents.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Queensland—Shipping—Compulsory Pilotage—Negligence of Licensed Pilot—Government not liable—Navigation Act, 1876 (41 *Vict., No.* 3, *Queensland*).

The respondents sued the appellant (representing the Government of Queensland) to recover damages caused to their ship by the negligence of a licensed pilot compulsorily in charge of her under the Navigation Act, 1876, s. 113. Under that statute pilots are licensed and appointed to the ports by the Government and receive salaries paid out of the State revenue, while pilotage rates are paid by the shipowners using the ports to the Government. The licensed pilots are classed as civil servants under the Public Service Act, 1896, and are subject to Government regulations, which, however, do not interfere with the pilots' management of the ships:—

Held, that the action was not maintainable, since the Government owed to the respondents no duty to manage or control their ship, but merely a duty to license and appoint duly qualified pilots, and no failure to perform the latter duty was alleged.

Appeal from a judgment of the Supreme Court of Queensland (December 4, 1914) affirming the judgment of Chubb J. at the trial.

The respondents brought an action in the Supreme Court against the appellant, who represented the Government of the State under the Claims against Government Act (29 Vict., No. 23), to recover damages for injuries to their steamship *Eastern* by a stranding in the port of Brisbane, caused, as they alleged, by the negligence of a licensed pilot in whose charge she had been placed in conformity with the compulsory provisions of the Navigation Act, 1876, s. 113. The appellant, while denying the alleged negligence, pleaded that the Government was not liable in law. By order a

* *Present:* Lord Buckmaster L.C., Earl Loreburn, Viscount Mersey, and Lord Shaw of Dunfermline.

special case was stated for the opinion of the Full Court upon the question of law so raised.

The effect of the material statutory provisions of Queensland with regard to pilotage may be shortly stated as follows: The Navigation Act, 1876, which consolidated the law and repealed previously existing statutes, by s. 113 provides under penalties that the master of every ship, not exempt from pilotage, entering or leaving a port whereat any pilot shall have been appointed shall give his ship into the charge of a duly qualified pilot. Under that Act and regulations made thereunder pilots are licensed by the Marine Board, a Government department thereby constituted, are appointed to ports by the Governor in Council, and receive salaries paid out of the Consolidated Fund of the State; subject to exemptions introduced by the Port Dues Revision Act, 1882, pilotage rates are paid by shipowners using a port and are paid into the Consolidated Fund. The licensed pilots are civil servants under the Public Service Act, 1896, and subject thereby to dismissal, reprimand, and punishment; they are subject to regulations made by the Marine Board as to their professional duties, but those regulations do not interfere with their control and management of the ships in their charge. It appeared that the Government supplied boats and crews for the pilots appointed to the ports.

The Full Court (Cooper C.J. and Chubb, Shand, and Real JJ.), by a judgment delivered on February 20, 1913, and reported at (1913) S. R. Qd. 64, held that the action was maintainable.

Upon appeal to the High Court of Australia, that Court on June 16, 1913, set aside the judgment of the Full Court, but remitted the case for trial. Barton A.C.J. and Powers J. agreed with the judgment appealed from, being of opinion that the Government had undertaken the business of pilotage and was consequently liable for the negligence of their servant in carrying it out. Isaacs J. dissented, holding that the duty of the Government could not be placed higher than that of seeing that a duly qualified pilot was appointed. The two remaining judges, Gavan Duffy and Rich JJ., were of opinion that the facts were not sufficiently stated to enable them to determine whether the Government was carrying on a pilotage business; they accordingly declined to answer the question submitted. The judgments are reported at 17 C. L. R. 149.

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The trial took place before Chubb J. and a jury. The jury found that the stranding was due to the negligence of the pilot, and the learned judge entered judgment for the respondents and directed an inquiry as to damages. He considered that he was bound by the decision of the Full Court, there being no new facts before him. Upon appeal to the Full Court it was agreed by the parties that the judgment should be affirmed without prejudice to the appellant's right of appeal to the Privy Council.

1916. May 22, 23, 25. *T. J. Ryan, K.C.* (*A.-G. for Queensland*), and *Aspinall, K.C.* (with them *Clauson, K.C.*, and *Micklethwait*), for the appellant. The Government owed to the respondents no duty to pilot their ship, but merely a duty to license and appoint qualified persons. It is not material that the pilots received salaries and that pilotage rates were paid. The Government being under no duty to pilot the ship, the pilot was not their servant as regards the pilotage, and they are not liable for his negligence : *Holman* v. *Irvine Harbour Trustees* (1) ; *Dudman* v. *Dublin Port and Docks Board* (2) ; *Shaw, Savill and Albion Co.* v. *Timaru Harbour Board* (3) ; *Otago Harbour Board* v. *Cates.* (4) The same principle was applied in *Stanbury* v. *Exeter Corporation* (5) and *Evans* v. *Liverpool Corporation.* (6) Under similar statutes of New South Wales as to pilotage the Supreme Court of that State held that the Government were not liable : *Actieselskabet Bannockburn* v. *Williams.* (7) The Government had no power to carry on a pilotage business, and there was no evidence upon which it could properly be held that they were doing so. The liability in *Mersey Docks and Harbour Board* v. *Gibbs* (8) was based upon there being a statutory duty upon the defendants to keep the harbour safe. [*Enever* v. *Rex* (9), *Baume* v. *The Commonwealth* (10), and Beven on Negligence, 3rd ed., vol. 1, p. 327, were also referred to.]

Sir R. Finlay, K.C., and *Schiller, K.C.* (with them *R. A. Wright*), for the respondents. It is not contended that the Government

(1) (1877) 4 R. 406.
(2) (1873) Ir. R. 7 C. L. 518.
(3) (1889) 15 App. Cas. 429.
(4) (1883) 2 N. Z. L. R. 123.
(5) [1905] 2 K. B. 838.
(6) [1906] 1 K. B. 160.
(7) (1912) 12 S. R. (N. S. W.) 665.
(8) (1866) L. R. 1 H. L. 93.
(9) (1906) 3 C. L. R. 969.
(10) (1906) 4 C. L. R. 97.

are liable merely because they licensed the pilots. Here the Government received pilotage rates and paid salaries to the pilots, who were classed as civil servants and were under the control of the Government. The pilot was the servant of the Government, and they are accordingly liable for his negligence: *Mersey Docks and Harbour Board* v. *Gibbs* (1); *Parker* v. *North British Ry. Co.* (2); *Hillyer* v. *St. Bartholomew's Hospital* (3); *Smith* v. *Martin.* (4) The crucial test is whether the pilot was the servant of the Government. The Government undertook the pilotage just as in *Brabant & Co.* v. *King* (5) they undertook a bailment. In *Actieselskabet Bannockburn* v. *Williams* (6) the effect of the statutes was not correctly appreciated.

Aspinall, K.C., in reply referred to *Hall* v. *Lees.* (7)

July 14. The judgment of their Lordships was delivered by

EARL LOREBURN. In this case a steamship company sues the Government of Queensland (represented by the appellant as nominal defendant under statutory provisions for that purpose) to recover damages in respect of a vessel belonging to the company, which was stranded in the port of Brisbane. It is to be taken that the damage was caused by the negligence of one Maxwell, a pilot duly licensed and qualified for the port pursuant to the statutes there in force, and the pilotage was compulsory. The only question is whether the Government are liable for this negligence.

Chubb J. held the Government liable, and his order was affirmed by the Supreme Court of Queensland, from which this appeal directly comes. But the Board has also the advantage of judgments in the High Court of Australia, delivered at an earlier stage of the case. In both Courts the whole of the law was very carefully considered. Isaacs J. expressed an opinion that the Government were not liable, but the balance of opinion was decided in favour of the plaintiff company. It is therefore undoubtedly a difficult case.

It will be convenient to begin by considering the actual relations

(1) L. R. 1 H. L. 93.
(2) (1898) 25 R. 1059.
(3) [1909] 2 K. B. 820.
(4) [1911] 2 K. B. 775.
(5) [1895] A. C. 632.
(6) 12 S. R. (N. S. W.) 665.
(7) [1904] 2 K. B. 602.

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between the plaintiffs and the defendants, as created by law. The plaintiffs claim damages for breach of a duty owing to them. What was that duty? There was no contract between these parties. The duty, whatever it may have been, must be one that depends upon the statutes. It is not of course necessary that the statutes should contain an express statement of the duty, but it is necessary that the obligation should result from these enactments. Coming closer to the present case, the plaintiffs say that their ship was stranded owing to the negligence of a pilot named Maxwell. In order to succeed they must show that the law imposed upon the defendants the conduct and management of that particular ship by that particular pilot; and this they seek to do by reasoning which would make the Government liable for the conduct and management of all ships compelled to accept the pilotage of pilots in the same position as Maxwell. There is nothing inherently unreasonable in such a contention, but its weight depends upon the extent and nature of the duty which the Government owe to the shipowner. It is very necessary, for this reason, to look into the true position of Maxwell and other pilots, because that may help in answering the true question, namely, whether or not the Government had laid upon them the conduct and management of this ship. If so, then they were bound to use proper care and skill and are liable for failure to do so.

In examining the statutes, it is well to bear in mind the condition of things in regard to pilots before Parliament interposed. Originally the business was simply a matter of private enterprise; seamen of local experience made their own bargains with masters of ships. The acting Chief Justice (Barton J.) traces the sequel in his judgment. A licence was required, in the interests of public safety; then pilotage fees were turned by statute into pilotage rates, no doubt for public reasons, but still the rates were paid to the men for their private emolument. Then the Treasury took the rates and empowered the Government to fix the remuneration of pilots. "The statutes also provided for constitution of a Marine Board acting in the execution of its powers and functions under the control of the Crown. The same statutes regulated the pilots in their duties after the manner of public servants and provided for a pilotage service, and, indeed, as was admitted, the Government supplied

the port pilots with the instruments of their calling in the shape of boats maintained and crews paid, at Government cost, while the admissions and the regulations show that, on the other hand, the coast pilots were allowed to receive fees for themselves, and had to find their own boats and crews. The port pilots were made regular officers of the Government service, paid from the public funds, though the department called the Marine Board managed the pilot service under the immediate control of the Government. The port pilots were classified under the public service laws, according to salary, as professional servants of the Government." To this it may be added that pilotage in prescribed ports was made compulsory.

The language thus used by the learned judge is general in its terms, and was not of course intended to extend the words of the statutes, which lay down the functions of the Board and the nature of governmental control, but it presents the general result in a way from which their Lordships are not at all disposed to differ. They also entirely agree with the way in which Barton J. puts, a little earlier in his judgment, the resulting question, "Was it the duty (of the Government) to undertake with due care and skill the pilotage of such vessels, or was it only a duty to supply qualified pilots to those who were bound to accept the services of such officers?" The learned judge comes to the former conclusion, though expressing the same difficulty which their Lordships also feel, and which, in their case, is enhanced by the adverse authority not only of himself and the majority of his colleagues, but also of the Supreme Court of Queensland.

Nevertheless, their Lordships have been constrained to the conclusion that no greater obligation is laid on the defendants than that of providing qualified pilots. The fact that pilotage is compulsory cannot affect them. It is not they but the law that makes it so. The fact that, through the Marine Board, they license pilots cannot affect them. That has been repeatedly laid down and is not questioned. Yet, though the argument is placed on other grounds, the real thought behind the argument, which makes it forcible, is that if you compel a master to place his ship in the hands of some one else whom you designate without consulting him you ought to make good any loss arising from his negligence. There is an

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appearance of natural equity in this view, and, perhaps, more than an appearance ; but it is clearly established that this will not suffice, and, were it relevant, ample considerations might be adduced in support of the view which has prevailed. If, then, the defendants are to be made liable, it must be on the ground that they charge pilotage rates, which go into the Treasury, that they pay salaries to the pilots, whom they choose, dismiss, or reprimand, and that they class them in the Civil Service and supply them with boats, implements, and crews ; also that they make regulations which control them, but not regulations interfering with their conduct and management of ships.

Now, if the crucial question here were whether or not Maxwell was in the service of the defendants, as might arise in an action of wrongful dismissal, this class of evidence would be very cogent to show that he was in their service. It is the kind of evidence common in such cases. But if the question be, as their Lordships think it is, whether or not the defendants were bound to navigate this ship and employed Maxwell to do for them the work which they were bound to do, then it is not conclusive to say that he was in their service unless it can also be said that the Government were "the principals in the piloting of ships," to borrow the happy phrase of Isaacs J. That phrase seems to hit the point exactly. If Maxwell himself was the principal in the piloting of ships, then the defendants cannot be liable. It was he and not they who owed the duty of careful piloting to the plaintiffs.

In their Lordships' opinion these Acts of Parliament did not alter the original status of a pilot, which is, in effect, that he must be regarded as an independent professional man in discharging his skilled duties. If it had been intended to alter this old and familiar status, it is to be supposed that the Legislature would have done it more explicitly. What it has done is more consistent with a different and limited purpose, namely, to secure a proper selection, a proper supply, a proper supervision, and a proper remuneration of men to whose skill life and property is committed, whether the shipowner likes it or not. For this purpose they become servants of the Government. For the purpose of navigating ships they remain what they were, and the duty which the State or Government owes to a shipowner, exercised, it is true, by various authorities,

is to provide a qualified man in the terms of the statutes, but not to take the conduct or management of the ship. It is not said that they have failed in this duty of providing a qualified man.

Taking this view of the statutes themselves, their Lordships do not think it is necessary to review the authorities, which were exhaustively considered, both in the High Court of Australia and the Supreme Court of Queensland. They will only say that, if they had thought the Government were directed to carry on the business of pilotage, they would have held them responsible for negligence in that business, as in the case of *Brabant & Co.* v. *King*, (1), where the relation of bailor and bailee for hire was established.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and judgment entered for the appellant with costs throughout. The respondents must pay the costs of the appeal.

Solicitors for appellant: *Freshfields.*
Solicitors for respondents: *William A. Crump & Son.*

(1) [1895] A. C. 632.

[PRIVY COUNCIL.]

J. C.* 1916 *July* 14.

BULL AND OTHERS . . . . . APPELLANTS;

AND

ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

New South Wales—Crown Lands—Improvement Lease—Extension—Reversionary Grant—Voidable—Procedure to avoid—Crown Lands Act, 1895 (58 *Vict.*, *No.* 18, *N. S. W.*), *ss.* 26, 44.

There is no power under the Crown Lands Act, 1895, of New South Wales, s. 26, to grant to the holder of an improvement lease, granted under that section, an extension of his term from the date of the unexpired term of the existing lease. Sect. 44 of that Act, however, applies to an extension so granted, and it is consequently not void, but voidable; it can only be declared void by the procedure provided by s. 44, and an information for a declaration that it is void cannot be maintained.

APPEAL, by special leave, from a judgment of the High Court of Australia (December 1, 1913) varying a judgment of the Chief Judge in Equity of the Supreme Court of New South Wales.

In December, 1898, three improvement leases of certain blocks of Crown land in New South Wales were granted to Charles Bull under the provisions of s. 26 of the Crown Lands Act, 1895. In December, 1903, the then holders of the leases requested the Minister for Lands to extend the terms of the leases to twenty-eight years. The Minister for Lands recommended that the extension should be granted, and this recommendation was approved by the Governor in Council.

On July 11, 1904, the Governor by indorsements under seal upon each of the leases purported to grant to the holder an improvement lease for a term of sixteen years, commencing in each case from the day upon which the original lease for twelve years would expire. In November, 1911, a year's rent under each of the leases was paid

* *Present:* LORD BUCKMASTER L.C., EARL LOREBURN, LORD SHAW OF DUNFERMLINE, and SIR ARTHUR CHANNELL.

and accepted; these payments were in respect of the first year of the extended terms.

On December 8, 1911, the respondent commenced proceedings against the appellants, the holders of the leases, by information in the Equity side of the Supreme Court, claiming a declaration that the renewal leases were void, and possession. The appellants by their defence alleged that they had expended large sums on the lands, relying upon the validity of the renewals and upon all proper steps having been taken before they were executed; they denied the right of the respondent to the relief sought, and alternatively claimed that the relief should only be granted subject to restitution to the appellants of the money expended by them.

The suit was heard by the Chief Judge in Equity. It was admitted at the trial that the granting of the renewal leases had not been referred to the Local Land Board under the Crown Lands Amendment Act, 1903, s. 31, and that they had not been offered for sale under the Crown Lands Act, 1895, s. 26. The appellants proved the expenditure of money upon the lands beyond the amount which they were bound to expend under the covenants in the original leases.

The learned judge held that the renewals were invalid under s. 26, but that, under s. 44, they were voidable and not void; he was of opinion that the Crown could proceed by information, but that the appellants were entitled in equity to restitution of the money which they had expended. He accordingly declared the renewals voidable and ordered an inquiry as to the appellants' expenditure. The case is reported at 13 S. R. (N. S. W.) 23.

On appeal to the High Court of Australia a majority of that Court (Barton A.C.J., Gavan Duffy J., and Rich J.) held that the renewals were void, that s. 44 did not apply, and that the holders were not entitled to the equitable relief granted. Isaacs J. agreed in holding that the renewals were invalid, but differed in holding that they were voidable under s. 44, and that they could only be avoided by the procedure therein provided; he considered that if the renewals were avoided the holders were entitled to relief in equity. The appeal is reported at 17 C. L. R. 370.

1916. May 9, 11. *P. O. Lawrence, K.C.*, and *Alfred Adams*, for the appellants. There was power under sub-s. 6 of s. 26 of the Crown

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Lands Act, 1895, to grant the extensions to twenty-eight years, since the lands were inferior lands within the meaning of that sub-section. The "principal Acts" referred to in that section and in s. 44 include the 1895 Act, since by s. 1 (*c*) the Act is to be read as part of the Acts which by s. 2 are declared to be intended by that expression. But if the extensions were invalid they were, under s. 44, voidable by the Crown and not void. That section by its terms applies to all leases which do not comply with any of the statutory provisions. It was enacted to prevent the inconvenience arising from the "jumping" of invalid leases: *Osborne* v. *Morgan* (1); this inconvenience would still exist if the section were given a limited construction. Sect. 44 gives a new right, namely, either to avoid or sustain a lease; if the Crown desire to avoid a lease, the procedure provided, namely, by referring the case to the Local Land Board, must be followed: *Berkeley* v. *Elderkin* (2); *Reg.* v. *Essex County Court Judge* (3); *Bailey* v. *Bailey*. (4) The information was therefore not maintainable. In any case the jurisdiction of the Equity Court is a purely equitable jurisdiction conferred by the Equity Act, No. 24 of 1901, and the Crown was not entitled to a decree without compensating the appellants for expenditure made on the faith of the indorsements: *Lodge* v. *National Union Investment Co.* (5)

Bernhard Wise, K.C., and *Austen-Cartmell*, for the respondent. The renewals or extensions were void, both because they were granted in reversion, contrary to sub-s. 1 of s. 26 of the Crown Lands Act, 1895, and because the recommendation of the Local Land Board had not been obtained under the Crown Lands Amendment Act, 1903, s. 31. The power of granting extensions, given by sub-s. 6 of s. 26, applies only to scrub and inferior land leases granted under ss. 35 and 37 of the Crown Lands Act, 1889; this view is supported by the forms provided in the 1895 Act. Sect. 44 of the 1895 Act does not apply to a lease granted wholly outside the statutory powers. By the Crown Lands Act, 1884, ss. 5 and 6, the power of the Executive to lease Crown lands is limited to the powers conferred by the Legislature. This provision

(1) (1888) 13 App. Cas. 227.
(2) (1853) 1 E. & B. 805.
(3) (1887) 18 Q. B. D. 704.
(4) (1884) 13 Q. B. D. 855, 860.
(5) [1907] 1 Ch. 300.

would be nugatory if under s. 44 the Crown could " elect to sustain " a lease granted outside the powers given. In any case the procedure given by s. 44 does not exclude the previously existing right to proceed by information: *Reg.* v. *Hughes.* (1) There is no principle upon which the appellants are entitled to equitable relief against the Crown. [*Stewart* v. *Williams* (2) was also referred to.]

P. O. Lawrence, K.C., replied.

July 14. The judgment of their Lordships was delivered by

EARL LOREBURN. The controversy in this case arises from the fact that reversionary leases were granted to the appellants. If that was lawful, then this appeal must succeed. If it was unlawful, then the only point left is whether the leases so granted can be treated as voidable under s. 44 of the Crown Lands Act of 1895, or are wholly void. This Act and the prior Acts to which it refers must be construed in accordance with the ordinary canons of construction. It may be that it would be a hardship to the lessee to declare his lease void, or that it would be against the public interest to condone the grant of reversionary leases without the safeguard of competition. But these things are to be considered by the Government and Legislature of New South Wales. This Board has simply to construe the Acts which have been passed in that State and to advise the Crown as to their true meaning and effect.

The first question is whether or not the reversionary leases were lawfully granted. That depends upon s. 26 of the Act of 1895. Does that section enable the Crown to grant a renewal of a lease of these lands granted under the Act of 1895 ? If yes, it must be because of the sixth provision of that section. The language is very difficult. Either this provision is out of place in this section, because it is inconsequential to provide that a lease granted under the Act of 1895 is to be a subject to a provision that leases granted under prior Acts may be extended, or the Board must say that, though renewal under this sixth provision is expressly confined to leases granted under an earlier Act, yet it applies also to leases granted under the 1895 Act, and must say so in face of the first provision, which requires that no reversionary lease shall be granted under the 1895 Act. That would really be making, not declaring, law. The words

(1) (1865) L. R. 1 P. C. 81. (2) (1914) 18 C. L. R. 381.

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appearing in the early part of s. 26, namely, "the granting of the leases shall be subject to the provisions hereunder contained," do not, in their Lordships' opinion, authorize the addition of fresh language to any of the provisions. And if any of them has no application as it stands, it cannot be altered so as to make it apply. Therefore these reversionary leases were not lawful leases and cannot be sustained under the sixth provision of s. 26.

The second question is whether or not s. 44 requires that these reversionary leases shall be treated as voidable instead of being treated as void. This also is a difficult matter, as appears from the difference of opinion it has already evoked.

It appears clear that s. 44 may apply to these leases by virtue of the last portion of it. "Purchases or leases purporting to be made or granted after the commencement of this Act" include all such purchases or leases. But the Board have still to inquire whether these leases come within the class of those which are declared to be not void, but only voidable.

The section says that a lease "shall not be held to be void by reason of any breach or non-observance of the provisions of the said Acts." The Act of 1895 is on the same level with the said Acts by virtue of the last portion of s. 44. If these leases are (apart from s. 44) void, as their Lordships think they are, do they become so by virtue of any breach or non-observance of the provisions of the Act of 1895? They are void (apart from the relief now being considered) because they were reversionary leases. One of the provisions of the Act of 1895 (s. 26, proviso 1) forbids reversionary leases. Therefore these leases were void because of the breach or non-observance of that provision. It is to be observed that both s. 26 and s. 44 use the word "provision," in the former case to restrict the power of leasing, in the latter case to excuse what has been wrongly done. The latter section seems to have the former in view. Accordingly, s. 44 applies to this case, and these leases are voidable and are not to be held void, though they would have been so but for s. 44. As these leases, therefore, are made voidable by s. 44, the procedure enacted by that section for determining whether they shall be avoided or affirmed should be followed, and the information of the Attorney-General asking for a declaration that the leases are void fails.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the information of the Attorney-General of New South Wales dismissed with costs throughout. The respondent will pay the costs of this appeal.

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Solicitor for appellants : *J. H. Galbraith.*
Solicitors for respondent : *Light & Fulton.*

Distinguished. BENNETT & WHITE (CALGARY) LD. *v.* SUGAR CITY [1951] A. C. 786

[PRIVY COUNCIL.]

SMITH . . . . . APPELLANT ;

AND

COUNCIL OF THE RURAL MUNICIPALITY OF VERMILLION HILLS . . . . . } RESPONDENTS.

ATTORNEYS-GENERAL FOR CANADA AND FOR SASKATCHEWAN . . . . } INTERVENANTS.

J. C.* 1916 *July* 25.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Provincial Taxation—Assessment—Dominion Lands—Interest of Lessee—Validity—British North America Act, 1867 (30 *Vict. c.* 3), *s.* 125.

By the British North America Act, 1867, s. 125, "no lands or property belonging to Canada or any province shall be liable to taxation."

The appellant was assessed under Saskatchewan statutes, 6 Edw. 7, c. 36, and 7 Edw. 7, c. 3, and their amendments, in respect of Dominion land of which he held grazing leases from the Crown. Land is defined for the purpose of those statutes as including any estate or interest therein :—

Held, that the statutes could be read as imposing the tax upon the appellant's interest in the land, and should be so read in order to make them consistent with s. 125, above mentioned.

APPEAL from a judgment of the Supreme Court of Canada (March 23, 1914) affirming the judgment of the Supreme Court of Saskatchewan, en banc (July 9, 1913), which affirmed the judgment at the trial.

* *Present :* LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

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The appellant held from the Crown two leases of lands situated in the province of Saskatchewan, but vested in the Crown in the right of the Dominion. The leases conferred upon the appellant the exclusive right of grazing cattle upon the lands, and provided that he should not use the lands for any other purpose. Under statutes of the province the appellant was assessed in respect of the lands for 1909, 1910, and 1911, the assessments being made in part for local purposes and in part for the general purposes of the province. The statutes of the province under which the assessments were made for local purposes were the Local Improvements Act (c. 36 of 1906) as amended by c. 13 of 1908, c. 7 of 1908-1909, and R. S. Sask., 1909, c. 88; those under which the assessments for general purposes were made were the Supplementary Revenue Act (c. 3 of 1907) as amended by c. 9 of 1908, c. 6 of 1909, and R. S. Sask., 1909, c. 37. The taxes assessed under the latter set of Acts were to be assessed, collected, and enforced as though forming part of the taxes assessed under the Local Improvements Act, 1906. The definitions, amongst others, of "land," "owner," and "occupant" in that Act applied to all the above Acts. By the Local Improvements Act, 1906, s. 2, sub-s. 18, "'land,' 'lands,' or 'real property' includes lands, tenements and hereditaments, and any estate or interest therein."

The respondent municipality, who were organized as a local improvement district under the Rural Municipality Act (R. S. Sask., 1909, c. 87), sued the appellant for the amounts assessed for 1909, 1910, and 1911. The appellant, among other defences not material to this report, contended that the assessments were ultra vires, having regard to s. 125 of the British North America Act, 1867, which provides: "No lands or property belonging to Canada or any province shall be liable to taxation."

The judge at the trial gave judgment for the plaintiffs. That judgment was affirmed by the Supreme Court of Saskatchewan en banc and by the Supreme Court of Canada (49 Can. S. C. R. 563). Upon the question of ultra vires the Courts in Canada considered that the case was governed by *Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta.* (1)

(1) (1911) 45 Can. S. C. R. 170.

Hellmuth, K.C., for the appellant; *T. Mathew*, for the intervenant, the Attorney-General for Canada. By the terms of the Supplementary Revenue Act, 1909, s. 1, the tax is levied upon the land itself, and by s. 58 of the Local Improvements Act, 1906, it is made a special lien thereon; in default of payment the land may, under ss. 86 and 88 (the latter amended by c. 13 of 1908, s. 15), be vested in the Crown in the right of the province. The tax is therefore ultra vires under s. 125 of the British North America Act, 1867. Even if the tax is only upon the appellant's interest in the land, the statutory provisions interfere with the Dominion's administration of its Crown lands, since (1.) the leases provide that the lessee's interest shall not be assigned without leave, and (2.) upon an adjudication under s. 86 of the Act of 1906 the Dominion could only free the lands, under s. 87, by paying the tax and a redemption fee. In *Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta* (1) the entire beneficial interest in the lands had passed to the person taxed.

Sir R. Finlay, K.C., and *Colclough, K.C.*, for the respondents, and for the intervenant, the Attorney-General for Saskatchewan. Having regard to the definition of "lands" in the Local Improvements Act, 1906, s. 2, the tax was assessed upon the appellant's interest in the lands, and not upon the lands themselves. Only that interest would become vested in the province upon an adjudication under s. 86 of that Act. If any of the provisions for enforcing the tax are repugnant to s. 125 of the British North America Act, 1867, those provisions are void, but under the Colonial Laws Validity Act, 1865, the rest of the Act is valid, and the liability of the appellant in the action is not affected.

Hellmuth, K.C., replied.

July 25. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This appeal arises out of an action in which the appellant was held liable in the Courts below to pay a sum of 3118·78 dollars, being the amount assessed as tax upon certain lands in the province of Saskatchewan. The appellant's interest in these lands was conferred by leases from the Crown, granted to him by the Dominion Government, for grazing purposes. The lands were situated within a local improvement district, which was

(1) 45 Can. S. C. R. 170.

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subsequently organized as a municipality under a statute of the province. The tax in question was assessed by this municipality, which was the plaintiff in the action and is the principal respondent on this appeal.

The only question now raised is whether the appellant could be assessed for the tax, regard being had to s. 125 of the British North America Act, 1867, which provides that "no lands or property belonging to Canada or any province shall be liable to taxation."

The province of Saskatchewan formed part of the North-West Territory. But it was not organized under s. 146 of the Act of 1867, which provides for the admission of that territory by address to the Crown. It was organized and admitted by an Act of the Dominion Parliament. This Act was itself passed under the powers conferred by the British North America Act, 1871, which enabled the Parliament of Canada to establish new provinces in any territories forming part of the Dominion, but not included in any of its provinces, and to make provision for the administration, peace, order, and good government of any such new province. The Act of the Dominion Parliament, passed in 1905 in regard to Saskatchewan under these provisions, was 4 & 5 Edw. 7, c. 42, and known as the Saskatchewan Act. This established the part of the North-West Territory to which it related as the province of Saskatchewan, and provided that the provisions of the British North America Acts, which, of course, included s. 125 of the Act of 1867 already referred to, should apply as if Saskatchewan had been an originally united province and set up a Constitution for the new province analogous to that of the other provinces. By s. 20 it was enacted that as the new province was not to have the public land as a source of revenue, Canada should make certain annual payments to it. By s. 21 the Crown lands were to continue to be vested in the Crown and to be administered by the Government of Canada for the purposes of Canada.

It is thus clear that the authorities of the province have no power to tax Crown lands, and the real question is whether this restriction prevents them from imposing the tax in controversy upon a tenant of Crown lands. The appellant was tenant of the parcels of land to which the taxation was directed under two leases from the Dominion Government, for terms of years determinable on notice,

and with restrictions on assignment. The leases were granted for grazing purposes. The taxes in controversy were imposed under the provisions of certain statutes of the Legislature of Saskatchewan passed, as to some of them, for the purpose of facilitating local improvements, and as to some of them for general purposes of the province, and for enabling assessments to those purposes. Under these statutes districts are to be constituted with councils. The council is in each case empowered to impose a tax of restricted amount upon "every owner or occupant in the district for land owned or occupied by him." "Owner" is defined to include any person who has any right, title, or estate whatsoever, or any interest other than that of a mere occupant in any land. "Occupant" is to include the inhabitant occupier of any land, or, if there be no inhabitant occupier, the person entitled to the possession thereof, and the leaseholder or holder under agreement for sale, and any person having or enjoying in any way, or for any purpose whatsoever, the use of land. "Land" includes lands, tenements, and hereditaments, and any estate or interest therein. The secretary of every district is to make an annual return showing the lands on which the taxes have not been paid, and in case default is proved a judge of the Supreme Court may make an adjudication, the effect of which is to vest the land, but subject to redemption, in the Crown in right of the province.

The appellant was duly assessed in respect of the land comprised in the two leases, and the question is whether the assessment was valid. It is contended for the appellant that the tax is sought to be imposed on the land itself, which belongs to the Crown in right of Canada, and not on any individual who is interested in it. For the respondents, on the other hand, it is argued that all that is taxed is the interest of the appellant as a tenant of the land and not the land itself as owned by the Crown.

Their Lordships have arrived at the conclusion that the Supreme Court of Canada were right in affirming the judgment of the Supreme Court of Saskatchewan, which adopted the latter of these contentions. Following their decision in the analogous case from Alberta of *Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta* (1), where the scheme and definitions in the Local Improve-

(1) 45 Can. S. C. R. 170.

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ment Act of that province were substantially the same as those in the present case, the Supreme Court of Canada held that the taxing statute of Saskatchewan must be read, in accordance with a well-known principle, as not applying to the Crown or its lands. But they thought that there was no reason why it should not be treated as applying to an interest acquired by a private person under a lease from the Crown. The definitions of "land," "owner," and "occupant" make it easy to interpret the expression "land" as excluding any interest which still remains in the Crown. Their Lordships agree with this reasoning. They are of opinion that, although the appellant is sought to be taxed in respect of his occupation of land the fee of which is in the Crown, the operation of the statute imposing the tax is limited to the appellant's own interest. It appears to them that not only can the statutes be read as meaning this, and no more than this, when they use the word "land," but that they ought to be so read in order to make them consistent with s. 125 of the British North America Act, 1867, and not a nullity.

Other points were argued in the Courts below, such as that the province had no power to attach to a person not domiciled within it a personal liability to pay taxes, and that the respondent municipality had not the right to collect the assessments in question, even if they were lawfully imposed. But these other points were not pressed on behalf of the appellant in the argument at their Lordships' Bar, and it is therefore not necessary to deal with them.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with one set of costs. The Attorney-General for the Dominion of Canada will bear his own costs.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondents: *Bischoff, Coxe, Bompas & Bischoff.*

Solicitors for intervenants: *Charles Russell & Co. and George Hamilton.*

[PRIVY COUNCIL.]

MAHOMED SYEDOL ARIFFIN. . . . . APPELLANT;

AND

YEOH OOI GARK . . . . . RESPONDENT.

J. C.*
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July 20.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

Evidence—Infancy—Date of Birth—Family Record—Admissibility—Illustrations to Statute—Straits Settlements Ordinance III. of 1893, *s.* 32, *sub-s.* 5, *and Illustration* (*l*).

In an action in the Straits Settlements to recover the amount due upon certain mortgages the defendant pleaded that he was an infant when he executed them. As evidence in support of this plea there was tendered at the trial an entry recording the date of the defendant's birth made by the defendant's deceased father in a book in which he made similar entries with regard to his family :—

Held, that under the Straits Settlements Evidence Ordinance, 1893, s. 32, sub-s. 5, and having regard to illustration (*l*) to that section, the entry was admissible in evidence.

Illustrations appended to sections of a statute should be accepted, if that can be done, as being of relevance and value in construing the text ; they should only be rejected as repugnant to the section as the last resort of construction.

APPEAL from a judgment of the Court of Appeal of the Supreme Court of the Straits Settlements (March 2, 1915) affirming the judgment at the trial.

The respondent sued the appellant in the Supreme Court of the Straits Settlements (Penang) to recover the principal and interest due under mortgages executed by the appellant in 1912 and 1913. The appellant pleaded that he was an infant at the time when he executed the mortgages. The respondent by his reply joined issue, and pleaded further that he was induced to lend upon the mortgages by the fraudulent misrepresentation of the appellant that he was then of age, and that if he was in fact then an infant the amount claimed was recoverable as damages. At the trial before Sercombe-

* *Present :* LORD BUCKMASTER L.C., EARL LOREBURN, and LORD SHAW OF DUNFERMLINE.

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MAHOMED SYEDOL ARIFFIN v. YEOH OOI GARK.

Smith J. the appellant's brother proved an entry in a book kept by the deceased father of the appellant and containing records of the births, deaths, and marriages of his family; this entry recorded that the appellant was born on September 17, 1895, according to which date he was between seventeen and eighteen when the mortgages were executed. There was no other evidence to establish the age of the appellant. The witness stated that the entry did not come to the appellant's knowledge; there was further evidence, referred to in the judgment of their Lordships, relevant to the alleged fraud.

The learned judge held that the entry was not admissible in evidence under s. 32, sub-s. 5, of the Evidence Ordinance, 1893, the material parts of which are set out in their Lordships' judgment, and gave judgment for the respondent. In case he was wrong in so deciding he dealt with the question of fraud. He found that the advances were induced by the appellant fraudulently representing that he was of age, and held that the respondent was entitled to a charge upon the property mortgaged.

The Court of Appeal held that the evidence was properly excluded and accordingly affirmed the judgment without dealing with the alleged fraud.

The acting Chief Justice, Woodward J., was of opinion that a statement of the date of a person's birth was not one relating to the existence of a relationship by blood within s. 32, sub-s. 5. The terms of the sub-section extended the English law in that they applied in certain circumstances to statements made by living persons, but subject to that extension he thought that the intention was to reproduce the English law. Under that law *Haines* v. *Guthrie* (1) showed clearly that the statement was not admissible. Where in the section the English law of evidence was altered it was done so in clear terms, and he did not think that an intention to depart from that law ought to be inferred from illustration (*l*). The learned judge was of opinion that the explanation of the illustration was that given by Sercombe-Smith J., namely, that it was "an attempt to illustrate English law which admits such incidents of family history as are immediately connected with, and required for proof of, issues involving family succession, relationship, and

(1) (1884) 13 Q. B. D. 818.

legitimacy, such as the birth, marriage, and death of members of the family with the respective dates and places of those events." Ebden and Earnshaw JJ. concurred.

1916. June 2. *Sir Erle Richards, K.C.*, and *Sir W. Garth*, for the appellant. It is conceded that under the English law of evidence the entry in the book would only have been evidence of pedigree, and not of the date of birth. It was, however, admissible under the Evidence Ordinance, s. 32, sub-s. 5, as a statement relating to the existence of relationship by blood; this is made clear by illustration (*l*). Sect. 32 reproduces s. 32 of the Indian Evidence Act (I. of 1872) as amended by s. 2 of Act XVIII. of 1872, and the same illustrations are appended. The Indian Courts have held that a family record of this character is admissible under s. 32, sub-s. 5, as evidence of the date of birth recorded: *Dhanmull* v. *Ram Chunder Ghose* (1); *Ram Chandra Dutt* v. *Jogeswar Narain Deo* (2); *Oriental Government Security Life Assurance Co.* v. *Narasimha Chari.* (3) The illustrations should be treated as relevant; they are equivalent to decisions of the Legislature as to the construction of the section. Owing to the absence of a compulsory system of registration of births in India it is probable that it was intended to make family records of this kind, which are common in the East, admissible as evidence of the date of birth recorded. If the appellant was an infant, the facts disclose no case of fraud; but even if he acted fraudulently he could not be made liable in damages: *R. Leslie, Ld.* v. *Sheill.* (4)

E. M. Pollock, K.C., and *Parikh*, for the respondent. It is conceded that upon the case of fraud set up in the reply the respondent could not recover damages in this action, though he may have rights in equity. Upon the issue as to infancy the onus was upon the appellant, but except the book entry there was no evidence of his age. That entry was not admissible under s. 32, sub-s. 5, as evidence of the appellant's age. The statement as to the date of his birth is not one which "relates to the existence of any relationship by blood." Illustrations should not be read so as to extend the effect of the statute: *Koylash Chunder Ghose* v. *Sonatun Chung*

(1) (1890) I. L. R. 24 Calc. 265.
(2) (1893) I. L. R. 20 Calc. 758.
(3) (1901) I. L. R. 25 Madr. 183.
(4) [1914] 3 K. B. 607.

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Barooie (1); *Nanak Ram* v. *Mehin Lal* (2); *Kamalammal* v. *Peeru Meera Levvai Rowthen.* (3) The effect of illustration (*l*) is that the letter there referred to is admissible as evidence of the date of birth so far as material to the matters referred to in s. 32, sub-s. 5, but no further. The Indian decisions were wrong. Where s. 32 differs from the English law of evidence, as for instance under head 1, it does so in clear terms; the intention was to reproduce the then existing English law subject to those clearly expressed variations. [Stephen's Digest of the Law of Evidence, art. 31, notes to *Price* v. *Earl of Torrington* (4), and *Haines* v. *Guthrie* (5) were also referred to.]

Sir Erle Richards, K.C., replied.

July 20. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment and order of the Court of Appeal of the Supreme Court of the Straits Settlements, dated March 2, 1915. This judgment and order affirmed the judgment and order of the Court of first instance, pronounced on September 19, 1914.

The action was brought by the respondent, who is a money-lender, against the appellant for certain sums of money, amounting in all to 29,521 dollars. To this action the appellant lodged a defence that at the time of the transactions sued upon he was an infant.

The facts briefly stated are these: On March 21, 1912, the appellant's father died, the appellant being his second son. On October 16, 1912, December 13, 1912, and January 17, 1913, respectively, he executed in favour of the respondent three mortgages over his one-twelfth share of his late father's property. The amounts in the mortgages were 6000 dollars, 8000 dollars, and 10,000 dollars. Interest was stipulated for at 15 per cent. per annum for the first six months, and thereafter at 18 per cent. The respondent swears that at the date of the transaction he "suspected he (the appellant) was under age." "I thought," he says, "his mother would prove his age or, perhaps, his brother. I was in doubt even after the

(1) (1881) I. L. R. 7 Calc. 132.
(2) (1877) I. L. R. 1 Allah. 487.
(3) (1897) I. L. R. 20 Madr. 481, 483.
(4) (1703) 2 Sm. L. C., 12th ed., 294.
(5) 13 Q. B. D. 818.

doctor's certificate was produced. It may be wrong. There was still his mother or brother. He wanted the loan, so I did not go to see his mother or brother." Later in his evidence he stated: "I lent because of the high interest, 15 per cent., which was arranged between us."

The doctor's certificate was obtained for the following reason. The respondent swears: "I asked him" (the appellant) "if he were of age. He said, 'Yes.' I asked him for proof of majority. He said he would bring a doctor's certificate." The so-called certificate was: "This is to certify that in my opinion M. S. Ariffin is of the age of twenty-one years." Dr. Bright, on examination, says that he formed the opinion that the appellant was twenty-one, judging by his teeth, his appearance, and his voice. In their Lordships' view such a certificate is worthless. It is in truth not a certificate, but only an assertion of opinion. A formality of making a declaration before a magistrate was also gone through, but the declaration was merely this: "By the certificate of Dr. W. H. M. Bright, hereto annexed and marked 'A,' I believe I am over twenty-one years of age." Such a declaration, in their Lordships' opinion, is of no greater value than the certificate itself. Proof on the subject is not advanced by such documents.

When the evidence in the case came to be taken, the appellant's elder brother, one Che Ariffin, proved an entry relating to the appellant's birth in a book containing a record of births, deaths, and marriages in his family, kept by his late father. Entries were contained in the book of the births of three members of the family, and the entry regarding the appellant was this: "A boy by Fatima, alias Pusi, on Tuesday, 27th Rabi Lawal, 1313, exactly at 4 P.M. on September 17, 1895; name, Syedol Ariffin."

The sole question in the case is whether this entry is admissible in evidence. It was not contended before their Lordships that it was not in the handwriting of the father or a genuine document. Both of the Courts below have, however, held that the entry was not admissible, and, this being so, they also held that the defence of infancy has not been made out.

There is no question that the entry was made by one having special means of knowledge, and no suggestion that it was made before any question or dispute between the parties. If in itself admissible, it

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would go to show that at the time of the transactions in question the appellant was only seventeen or eighteen years of age.

The law of the Straits Settlements on the point of the admissibility of such a document in evidence depends upon the construction to be given to the language of s. 32 of the Evidence Ordinance, 1893, which is in similar terms to the Indian Evidence Act (I. of 1872).

Sect. 32 provides that " statements written or verbal of relevant facts made by a person who is dead . . . . are themselves relevant facts in the following cases . . . . (5.) when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage, or adoption the person making the statement had special means of knowledge, and the statement was made before the question in dispute was raised."

To this section are appended illustrations, and illustration (*l*) is as follows : " The question is, what was the date of the birth of A. ? A letter from A.'s deceased father announcing the birth of A. on a given date is a relevant fact."

In the construction of this language in India the practice of the Indian Courts appears to have been uniform. The cases of *Ram Chandra Dutt* v. *Jogeswar Narain Deo* (1), *Dhanmull* v. *Ram Chunder Ghose* (2), and *Oriental Government Security Life Assurance Co.* v. *Narasimha Chari* (3) have been cited to establish this, and in their Lordships' opinion they do so. In the Madras case Bhashyam Ayyangar J., referring to the first-mentioned case, observes : " The principle of the decision in my opinion is that the time of one's birth relates to the commencement of one's relationship by blood, and a statement, therefore, of one's age, made by a deceased person having special means of knowledge, relates to the existence of such relationship within the meaning of s. 32, clause 5."

The Courts below have, however, declined to accept this principle. They proceed upon two grounds. In the first place they think that the rule with regard to hearsay evidence, adopted in the English case of *Haines* v. *Guthrie* (4), should be followed in the Straits Settlements, and that that rule is not varied by the clause just cited

(1) I. L. R. 20 Calc. 758.
(2) I. L. R. 24 Calc. 265.
(3) I. L. R. 25 Madr. 183, 209, 210.
(4) 13 Q. B. D. 818.

from the Evidence Ordinance. And in the second place they hold that the illustration given in the statute does not in fact illustrate the section.

On the first point the view of their Lordships is that the rule and principle of the Colony must be accepted as it is found in its own Evidence Ordinance, and that the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction be varied, or denied effect. The learned Sercombe-Smith J. put the matter thus : " I think that it is safer to construe s. 32, (5.), and the illustrations on English lines than to extend the English law of evidence in reliance upon the language of s. 32, (5.), and the illustrations which it appears to me are construable as enacting in changed phraseology the principles of English adjective law." The Board does not think that such a method of construction is safe or is warranted, and they cannot agree with the view suggested, the true principle being, in their opinion, that above stated.

The Board makes no pronouncement upon *Haines* v. *Guthrie* (1), or the limitation, there affirmed, of hearsay to questions of pedigree ; but such a limitation finds no foundation in this colonial Ordinance, even in the words of the section, and this is made clearer by the illustration given thereto, as will be presently noted.

On the second point their Lordships are of opinion that in the construction of the Evidence Ordinance it is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired.

In the present case, however, no special or exceptional case of

(1) 13 Q. B. D. 818.

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construction arises. The section admits a statement which "relates to the existence of any relationship," when under all the other conditions as to knowledge, time when made, &c.—all of which conditions it is agreed are fulfilled. The illustration puts the question thus: "What is the date of the birth of A.?" And "A letter from A.'s deceased father to a friend announcing the birth of A. on a given day is a relevant fact." Their Lordships agree with the judgments in the Indian Courts above cited, that there is no repugnance between a statement which relates to the existence of a relationship and the illustration by a statement as to when A. was born, that is to say, when the relationship began.

Their Lordships, with much respect to the judges of the Court below, think that the document in question was admissible in evidence. The question as to whether the appellant had reached majority at the date of the mortgages sued on was left most doubtful on the evidence of the respondent himself, but the statement of the appellant's father, now admitted, appears to their Lordships to set the doubt at rest, and to establish minority.

A case of fraud by the appellant on the subject of his age was set up, but it cannot be doubted that the principle recently given effect to in the case of *R. Leslie, Ld.* v. *Sheill* (1) would apply, and such a case would fail. But their Lordships think it right to add that the statement made by the minor as to his age on the declaration before the magistrate, "by the declaration of Dr. W. H. M. Bright, ... I believe I am over twenty-one years of age," cannot be justly characterized as fraudulent: in short, a case of fraud does not appear to be established.

Their Lordships will humbly advise His Majesty that the judgment of the Court below should be recalled, and that the action should be dismissed with costs.

Solicitors for appellant: *Morse, Hewitt, Walter & Thornton.*
Solicitors for respondent: *Loughborough, Gedge, Nisbet & Drew.*

(1) [1914] 3 K. B. 607.

[PRIVY COUNCIL.]

HAMILTON, GRIMSBY, AND BEAMSVILLE RAILWAY COMPANY . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL FOR ONTARIO AND OTHERS . . . . . } RESPONDENTS.

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1916
July 18.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada—Legislative Authority—Work declared for General Advantage of Canada—Repeal of Declaring Act—British North America Act, 1867 (30 *Vict. c.* 3), *s.* 91, *sub-s.* 29, *and s.* 92, *sub-s.* 10 (*c*).

A declaration made by the Parliament of Canada under s. 92, sub-s. 10 (*c*), of the British North America Act, 1867, that a provincial work or undertaking is for the general advantage of Canada, whereby under s. 91, sub-s. 29, of that Act the work or undertaking becomes subject to the exclusive legislative authority of the Dominion, can be repealed or varied by a subsequent Act of that Parliament, and thereupon the work or undertaking ceases to be under Dominion authority, or ceases to be so save to the extent then declared.

APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (November 9, 1915), affirming an order of the Ontario Railway and Municipal Board.

The appellants, who were incorporated in 1892 by an Act of the Legislature of Ontario, owned an electric railway situate wholly within that province. In 1895 permission was obtained from the Railway Committee of Canada for the railway to cross the line of the Grand Trunk Railway. This permission was required in the case of an electric railway by s. 1 of the Railway Act, 1893, of Canada.

By s. 306 of the Railway Act, 1888 (51 Vict. c. 29, Canada), certain named railways, including the Grand Trunk Railway, and "every branch line or railway now or hereafter connecting with or crossing" the named railways, were declared to be works for the general advantage of Canada.

The whole of the Railway Act, 1888, was repealed by s. 310 of the

* *Present:* LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

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Railway Act, 1903 (3 Edw. 7, c. 58, Canada); that Act, by s. 7, declared every provincial railway, steam or electric railway or tramway, connecting with or crossing a Dominion railway to be a work for the general advantage of Canada in respect only of the connection or crossing, and certain other matters. The Act of 1903 was re-enacted with slight modifications by R. S. Can., 1906, c. 37.

On May 10, 1915, the Ontario Railway and Municipal Board, by an order under s. 255 of the Ontario Railway Act (R. S. Ont., 1914, c. 185), required the appellants to provide certain sanitary conveniences upon their cars, which was not one of the matters referred to in s. 7 above mentioned. The order was affirmed upon appeal to the Appellate Division. The learned judges agreed with the view of the above Board that s. 306 of the Railway Act, 1888, applied only to branches of the railways named; they consequently rejected the contention of the appellants that the railway was subject to the exclusive legislative authority of the Parliament of Canada under the British North America Act, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10 (*c*); this decision rendered it unnecessary to consider the effect of the repeal of the Railway Act. The judgment is reported at 34 Ont. L. R. 599.

1916. July 18. *Hellmuth, K.C.*, for the appellants. Upon its true construction s. 306 of the Railway Act, 1888, applies to all provincial railways crossing the railways named therein. From the time when the appellants' railway crossed the Grand Trunk Railway it consequently passed under the exclusive legislative authority of the Dominion by reason of s. 91, sub-s. 29, and s. 92, sub-s. 10 (*c*), of the British North America Act. The Provincial Board therefore had no jurisdiction over it. The subsequent repeal of the Act of 1888 does not take away the status which the railway acquired under the declaration in s. 306. There is no power under the British North America Act enabling the Dominion Legislature to hand over its authority to a provincial Legislature. [*Montreal City* v. *Montreal Street Railway* (1) and *Grand Trunk Ry. Co.* v. *Hamilton Radial Electric Ry. Co.* (2) were referred to.]

Sir R. Finlay, K.C., and *Tilley, K.C.*, for the respondent Attorney-General. Even if s. 306 of the Railway Act, 1888, can be construed

(1) [1912] A. C. 333. (2) (1897) 29 Ont. Rep. 143.

as applying to the appellants' railway, it does not contain an effectual declaration under s. 92, sub-s. 10 (*c*), of the British North America Act. The declaration must be as to a specific work or undertaking. A general declaration, such as s. 306 is said to amount to, is ultra vires. If s. 306 contains an effectual declaration applicable to the appellants' railway, upon the repeal of that section the railway ceases to be a work declared for the general advantage of Canada. But upon the true construction of s. 306 it applies only to branches of the railways named.

Hellmuth, K.C., in reply. If it is within the competence of the Parliament of Canada to restore to the provincial legislative authority a work which it has declared for the general advantage, it can only do so by express enactment.

The judgment of their Lordships was delivered by

LORD BUCKMASTER L.C. This is an appeal of the Hamilton, Grimsby, and Beamsville Railway Company against a judgment of the Appellate Division of the Supreme Court of Ontario affirming an order of the Ontario Railway and Municipal Board dated May 10, 1915. The order of the Railway Board directed that the appellants should construct certain sanitary conveniences on their railway, and the appeal against that order was brought, not because the appellants objected to the construction of the sanitary conveniences, but because they asserted that the Ontario Railway and Municipal Board had no jurisdiction whatever to make the order, inasmuch as their railway was really a Dominion railway, and not in any way under the control of the Provincial Board.

The facts of the case are these. The appellant company was incorporated by the province of Ontario in 1892. The extent of the railway they were formed to construct and work is some twenty-three miles or thereabouts. It is worked by electric power, and it is wholly situate within the province of Ontario. In 1895 the appellants proposed to carry their railway across the track of the Grand Trunk Railway, and an order was made on January 28, 1895, permitting such crossing. The appellants assert that, by virtue of the British North America Act of 1867 and the Railway Act of Canada of 1888, the effect of that order was to take their railway

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out of the jurisdiction of the province of Ontario and place it within the category of a Dominion railway.

The British North America Act of 1867, by s. 92, provides that in each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects that are there enumerated, and among the classes that are enumerated are local works and undertakings, other than "such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces."

In 1888 the Railway Act of Canada was passed, and this contained certain provisions with regard to railways crossing other railways that were within the legislative authority of the Parliament of Canada. There are many sections in that statute to which reference would be needed if it were necessary to consider exactly the terms of s. 306 upon which the appellants rely, for it is quite true that, if a comparison be made between s. 306 and some of the other sections, a contrast will be found between the specific railways which are the subject of s. 306 and the general terms in which all railways are referred to in the other sections. This would become a very important matter if their Lordships thought it was essential to construe s. 306. But they do not think it is essential, for this reason, that even assuming in favour of the appellants that s. 306 did effect a declaration within the meaning of s. 92, sub-s. 10 (*c*), of the British North America Act, and thus place the railway within the authority of the Dominion and outside the authority of the province, yet none the less that statute has been in terms repealed, and if that repeal is effectual to change the status of the appellant company, then their railway is a Dominion railway no longer, and the Ontario Railway and Municipal Board had full jurisdiction to make the order which is the subject of the appeal.

The statute which effected this repeal was passed in 1903. The repealing section is s. 310, and that repealed in toto the previous statute, and by s. 7 a special declaration is made with regard to railways crossing other railways that were subject to the legislative authority of the Parliament of Canada. That section runs in these terms: "Every railway, steam, or electric street railway or tramway, the construction or operation of which is authorised by a special Act

passed by the Legislature of any province now or hereafter connecting with or crossing a railway, which, at the time of such connection or crossing, is subject to the legislative authority of the Parliament of Canada is hereby declared to be a work for the general advantage of Canada, in respect only to such connection or crossing, or to through traffic thereon, or anything appertaining thereto. . . . ."

The railway in question answers every one of the necessary conditions prescribed in the earlier part of s. 7. If, therefore, there was power left in the legislative authority of the Dominion of Canada to pass this Act, then it is obvious that, even assuming the railway had been placed within that authority by s. 306, it is there no longer, and there is no power within the Dominion to control its affairs. Their Lordships are clearly of opinion that s. 92, sub-s. 10, never intended that a declaration once made by the Parliament of Canada should be incapable of modification or repeal. To come to such a conclusion would result in the impossibility of the Dominion ever being able to repair the oversights by which, even with the greatest care, mistakes frequently creep into the clauses of Acts of Parliament. The declaration under s. 92, sub-s. 10 (*c*), is a declaration which can be varied by the same authority as that by which it was made. In the present case their Lordships see no reason to doubt that if the statute of 1888 effected such a declaration as to place the whole railway under Dominion control, that declaration has been properly and effectually varied, and the appellant company have ceased to be, even if they ever once were, under the control of the Dominion Board.

Other questions have been raised in the course of the argument, and notably one of great importance, with regard to the power of the Dominion Parliament to pass such a statute as that of 1888, on the hypothesis that s. 306 bore the meaning for which the appellants contend. This question is of great importance, but, for the reasons that have been given, its decision is unnecessary.

Their Lordships think that this appeal should be dismissed on the simple question which has already been stated.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants : *Blake & Redden.*
Solicitors for respondent Attorney-General : *Freshfields.*

[PRIVY COUNCIL.]

J. C.*
1916
July 24.

THETFORD MINES TOWN CORPORATION . APPELLANTS;

AND

AMALGAMATED ASBESTOS CORPORATION, LIMITED. . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR QUEBEC, APPEAL SIDE.

Canada (Quebec)—Local Taxation—Exemption of Mining Operations—Assessment on Mining Plant and Machinery.

A statutory exemption of a mining company from further taxation in respect of its mining operations does not exempt the company from liability to pay a tax subsequently assessed by the township upon the company's immovable property, including mining plant and machinery.

APPEAL by special leave from a judgment of the Court of King's Bench for Quebec, Appeal Side (November 15, 1913), varying a judgment of the Superior Court of the Arthabaska District.

The appellants sued the respondents, a mining company owning mines within the township, to recover the amount of a tax assessed under a by-law upon their immovable property. The respondents, as payers of a special tax previously assessed upon them, were by statute exempt from "any other special tax in respect of their mining operations." The facts and the material statutory provisions are stated in the judgment of their Lordships.

The trial judge, in the Superior Court, held that the respondents were liable for the whole of the tax assessed.

The Court of King's Bench, Appeal Side, drew a distinction between so much of the tax as was assessed upon the respondents' land and so much as was assessed upon their buildings, mills, machinery, rolling stock, and office, constituting immovables by destination as defined by art. 379 of the Civil Code of Lower Canada. So far as the tax was assessed upon these latter, they held that it came within the exemption, and that the respondents were not liable.

* *Present:* LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

1916. July 3. *Macmaster, K.C.*, and *G. G. Stuart*, for the appellants. The effect of s. 21, sub-s. 3, of the appellants' incorporating Act (5 Edw. 7, c. 48) is merely to exempt the respondents from a special business tax imposed under s. 479 of the Cities and Towns Act, 1903 (art. 5735, R. S. Q., 1909). The present tax was imposed upon all immovable property in the township, and is not a special tax within the meaning of the section. Nor is it, by reason of its being assessed upon the respondents' plant and machinery, a tax upon their mining operations. [5 Edw. 7, c. 48 (Quebec), ss. 24, 26, and the Cities and Towns Act, 1903 (Quebec), ss. 396, 443, 474 (R. S. Q., 1909, arts. 5651, 5699, and 5730), were also referred to.]

Sir R. Finlay, K.C., and *Hon. M. Macnaghten*, for the respondents. The tax now in question is described in the by-law by which it is imposed as a special tax. The respondents' mining plant and machinery are only of value when used in connection with their mining operations. A tax assessed upon that property is a tax upon their mining operations within the meaning of the sub-section. If there is any doubt as to the respondents' liability the sub-section and by-law should be construed against the taxing authority.

July 24. The judgment of their Lordships was delivered by

LORD BUCKMASTER L.C. The resolution of the dispute in this case depends upon the true meaning to be given to a short but equivocal section in a statute of Quebec (5 Edw. 7, c. 48), by which the appellants were incorporated.

The question raised is as to the liability of the respondents, who are a mining company, to pay a sum of 1711·60 dollars, the proportion, assessed in respect of their buildings, machinery, and fixtures, of a special tax levied by the corporation for the purpose of providing an aqueduct and waterworks for the town. The Court of King's Bench of the Province of Quebec, reversing the judgment of the Superior Court, have declared that the respondents are not liable, and from them this appeal has been brought.

The appellants were formerly the corporation of the village of Kingsville, in the Province of Quebec, but by the statute to which reference has already been made they were incorporated under their present name on May 20, 1905. By s. 4 of the statute the territory and boundaries of the town were defined, and within that territory

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the respondent company carries on its business of mining and owns immovable property consisting of land, asbestos mines, buildings, and machinery.

In the statute giving powers to the corporation special provisions are contained for taxation relating to mines, and these are to be found in s. 21 and its three sub-sections. It is sub-s. 3 alone which gives rise to the difficulty in this case, but in order to ascertain the true meaning of that sub-section it is necessary to consider the section as a whole. It is in the following words: "1. The council may, notwithstanding any law to the contrary, make, amend, or repeal by-laws to compel every person or company owning or occupying lands comprised within each division described in the following article, whether they mine or do not mine on the said land, to pay the municipality a special yearly tax determined in the following manner:—(*a*) A sum of 50 dollars, for every person or company not mining on its own land, or paying less than 10,000 dollars in wages to its employees, yearly; (*b*) An additional sum of 100 dollars, for every 10,000 dollars of wages paid to the employees, provided the total amount of the tax does not exceed 500 dollars. 2. The tax above designated can be imposed only during twenty years after the coming into force of the present Act. 3. The persons and companies subject to this special tax shall be exempt from any other special tax in respect to their mining operations."

After their incorporation the appellants duly passed certain by-laws. The first on December 26, 1905, was identical in terms with s. 21. The second was passed on May 17, 1909, and was adopted on June 9, 1909, and it is this by-law by which the power to levy the tax in question was conferred on the appellants. It took the form of authorizing the issue of certain debentures to secure a loan of 200,000 dollars, the amount to be raised for the purpose of paying debts incurred in the purchase of an aqueduct and the building or improving of a system of waterworks; in order to provide for the interest at 5 per cent. upon this money and a sinking fund of 1 per cent. it further provided that the sum of 12,000 dollars should be collected annually for a period of forty-five years by a special tax on the immovable property situated within the limits of the town, and such tax was imposed rateably at so much in the dollar on all such property within the district according to the valuation

roll then in force. Under this by-law the respondent company was assessed in respect of its immovable property at a total sum of 1884·60 dollars. The assessment was distributed between two mines owned by the respondents, and known as the King's Mine and the Beaver Mine, and made up of various sums appropriated to different descriptions of property, the total special tax on the land being 173·70 dollars, and that on various items under the following heads—buildings, mill, storage, &c., mill machinery and installation, hoisting apparatus, rolling stock and track, office—being 1711·60 dollars in all, thus making up the total sum of 1884·60 dollars.

This sum the company declined to pay, and these proceedings were instituted for its recovery. The ground of defence to the action depended entirely upon sub-s. 3 of s. 21, the company alleging that the tax was a special tax in respect to their mining operations within the meaning of that sub-section and that they were consequently exempt from its payment. The Superior Court found against them for the total sum, but the Court of King's Bench limited the tax to the items representing the lands, namely, 173·70 dollars, and held that, in respect of the other items, the company had established their defence.

Their Lordships are unable to agree with this view. In ordinary language mining operations are something quite distinct from the means by which those operations are carried out. Ownership of property and the use to which that property is put are separate conceptions, and, in their Lordships' opinion, the Court of King's Bench was in error in thinking that in the present instance these two ideas were one.

Considering the whole structure of s. 21, it in substance imposes a tax upon the working of a mine. It is quite true that the section in terms declares that it is a tax on a company owning lands, whether they mine or not, but if they do not mine the tax is a fixed annual payment of 50 dollars; while, if they do, the tax is levied according to the wage bill of the company, and proceeds on an ad valorem scale, rising with the payment of these wages up to, but not exceeding, 500 dollars. If the 50 dollars can be regarded as a fixed tax upon the land, the remainder of the tax is only payable in the event of the mine being worked, and depends for its amount on the extent of the mining operations.

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In their Lordships' opinion sub-s. 3 is intended to exempt the mining company from any similar taxation. It is quite possible that power to impose such taxation is conferred by s. 479 of the Cities and Towns Act, 1903 (now art. 5735 of the Revised Statutes of Quebec, 1909), which was expressly incorporated in the statute of 5 Edw. 7, c. 48, but, even if it were not, the section is intended to protect the company from a double tax on mining operations, however imposed. A tax, if imposed selectively upon mines, would be, in their Lordships' opinion, a special tax, for, in the absence of any definition of a special tax, such a tax would be either a tax levied generally on all property for a special purpose, such as the tax in question, or a tax on a special industry levied either for special or general purposes. It may not be easy to define exactly the line which will separate in all cases a special from a general tax. It is sufficient to say that a tax may be special either by reason of the object for which it is levied or the subject out of which it is raised. In the present case there is no doubt that the tax is a special tax by reason of the purpose for which it is imposed, and it is declared to be so by the by-law by which it was authorized. Their Lordships think, however, that the sub-section must be read not as meaning a special tax by reason of the purposes to which it is to be applied, but as a tax specially laid upon mining operations, and this condition the present tax certainly does not fulfil. Apart, however, from this conclusion, their Lordships still think that the respondents would be liable. It is urged on their behalf that the sub-section might be read as though it provided that companies shall, in respect of their mining operations, be exempt from any special tax, under whatever category the special tax might fall. Even conceding this, there would still remain the question as to whether it is in respect of the mining operations that the tax has been levied. In this connection their Lordships can draw no distinction between the land and the machinery and buildings which stand upon it. They are, taken together, the necessary property that must be owned for the purpose of mining, but there is no reason why a difference should be made between the land on the one hand and the buildings and the machinery on the other. They are all equally immovable property, and if one part must be exempt the other must be also. Now the respondents do not challenge the tax upon the real property

apart from the buildings and machinery, nor if they did would their challenge be effectual, for such an argument would result in saying that the mining company in respect to its mining property should be exempted from the special tax. These are not the words used, nor are they their equivalent in meaning. It is the use and purpose to which the property is put which constitute the mining operations, and it is not this upon which the general tax has been placed.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, that the judgment of the Court of King's Bench should be set aside with costs, and the judgment of the Superior Court restored.

The respondents will pay the costs of this appeal.

Solicitors for appellants : *Stephenson, Harwood & Co.*
Solicitors for respondents : *Blake & Redden.*

[PRIVY COUNCIL.]

JAMES DE SOYSA . . . . . APPELLANT ;

AND

MARIA DE SOYSA . . . . . RESPONDENT.

J. C.* 1916 *July* 25.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Husband and Wife—Separation Deed—Annuity payable to Wife—Divorce—Roman-Dutch Law—Ceylon Ordinance 15 *of* 1876.

A husband and wife, domiciled in Ceylon but living apart, entered into a deed of separation which provided that the husband should pay the wife an annuity by monthly instalments. The right to the annuity was not to be affected by a dissolution of the marriage by reason of the misconduct of either party. The marriage was subsequently dissolved owing to the husband's misconduct. The wife sued to recover an instalment of the annuity payable after the dissolution :—

Held, that, with regard to the matrimonial rights of persons domiciled in Ceylon, Ordinance 15 of 1876, except in the case of an

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ambiguity, excludes considerations of Roman-Dutch law; that the agreement for an annuity was valid under s. 13 of that Ordinance, and the instalment recoverable.

APPEAL from a judgment of the Supreme Court of Ceylon (August 7, 1914) affirming a judgment of the District Judge of Colombo (May 11, 1914).

The appellant, a Cingalese domiciled at Colombo, was married to the respondent in London in 1903, and they lived together in England and subsequently in Colombo. In December, 1912, in consequence of differences between them, they commenced to live apart, and on March 25, 1912, they entered into a deed of separation. The deed provided that the appellant should pay to the respondent an annuity of Rs.7200 by monthly instalments; the payment was secured by a mortgage of property thereto scheduled, and was to cease if the respondent took any steps to compel the appellant to cohabit with her, or should molest the appellant. It further provided that its provisions should not prejudice the right of either party to sue for a dissolution of the marriage by reason of previous or subsequent misconduct of the other, and that the dissolution of the marriage by reason of misconduct of either party should not affect the respondent's right to the annuity.

In May, 1912, the respondent brought a suit for divorce, reciting the deed in her plaint, and stating that, in view of the provision for her maintenance thereby made, she made no claim for alimony. A decree nisi was passed and was made absolute on January 15, 1913. The annuity was duly paid till August, 1913. The respondent instituted the present suit on August 19, 1913, to recover Rs.600, being a month's instalment due under the deed. The appellant pleaded, inter alia, that the deed was void.

The District Judge of Colombo held that the deed was not void as contrary to public policy, and that the provision of the annuity was valid under s. 13 of the Ceylon Ordinance 15 of 1876.

Upon appeal the Supreme Court affirmed the decision by a judgment reported at 17 Ceylon N. L. R. 385.

1916. June 29. *De Gruyther, K.C.*, *E. W. Perera*, and *Erfan Ali*, for the appellant. The agreement, though not void as contrary to

public policy, is voidable as being inconsistent with the principles of Roman-Dutch law. Under that law gifts inter vivos, and agreements for gifts, between a husband and wife are prohibited. The annuity does not come within s. 13 of Ordinance 15 of 1876 (1) as a " voluntary grant, gift, or settlement." There was no delivery, but only an agreement to grant or give, and no property was settled ; also the agreement was for consideration and not voluntary. Further the agreement creates a right to recover a debt secured by mortgage of immovable property. That right is movable property : Maasdorp, vol. 2, p. 4 ; and as movable property it vests in the husband under s. 19 of the Ordinance. [*Babapulle* v. *Rajaratnam* (2), *Scholtz* v. *Felmore* (3), and *Albertus* v. *Albertus* (4) were referred to.]

Sir Erle Richards, *K.C.*, and *Kenworthy Brown*, for the respondent, were not called upon.

July 25. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal against a judgment pronounced by the Supreme Court of the island of Ceylon, dated August 7, 1914, affirming the judgment of the District Court of Colombo, dated May 11, 1914.

The parties were married on September 22, 1903. There is no issue of the marriage. The appellant had made an antenuptial settlement in favour of the respondent, his wife, and during the marriage he also made to her certain substantial gifts. There is no question with regard to these in this case.

On March 25, 1912, they entered into an agreement of voluntary separation a mensa et thoro. Under this agreement the appellant undertook to pay the respondent during her life " the annual sum of Rs.7200 in monthly instalments of Rs.600 each."

On January 15, 1913, the respondent obtained a decree (absolute) of divorce against her husband in respect of adultery committed by him, and the marriage was thus dissolved. By the agreement sued on, however, this event had been provided for, and it was stipulated that " nothing in this indenture shall prejudice or affect the right "

(1) The section is set out in the judgment.

(2) (1900) 5 Ceylon N. L. R. 1.

(3) (1886) 4 Juta, 192.

(4) (1859) 3 Searle, 202.

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to sue for a dissolution of the marriage. The agreement further provided that "the dissolution of the said marriage by reason of such misconduct . . . . shall in no manner affect or prejudice the provision heretofore and by these presents made for the said" wife.

In the present suit she claimed Rs.600, being the instalment payable under the agreement to her on August 10, 1913. The action is of course a test as to her right to her annuity under the agreement.

In the Court below various defences were taken which were very properly not insisted in before the Board. In particular it was not contended that the agreement sued on was voidable as contrary to public policy. Although not strongly contended for, it was, however, suggested in argument that such an agreement for a voluntary separation was inconsistent with the principles of Roman-Dutch law. Their Lordships see no reason to doubt the judgment of the Supreme Court thus expressed upon that subject by de Sampayo J.: "I cannot find any authority for saying that under the Roman-Dutch law an agreement for separation is wholly illegal." The learned judge investigates with care the authorities upon the topic, and sums these up by saying: "The result of all the authorities is that an agreement for voluntary separation and a provision as to property are not only not illegal but valid as between the parties themselves, and only ineffectual for certain purposes."

More stress was laid in argument upon certain principles put forward as those of the Roman-Dutch law, and said to be still operative, namely, (1.) that the funds out of which this annuity was derived were within the scope of the communio bonorum, and consequently fell to the husband in virtue of his jus mariti; while as to the control and management thereof, this was also entirely his, in virtue of his right of marital administration. The second point put forward was that under the same assumption, namely, that the situation was governed by Roman-Dutch legal rule, gifts which would include annuities such as the present were void between husband and wife. Upon the latter point there might be a variety of view as to whether donationes inter virum et uxorem were void or were merely revocable, or—as the learned District Judge of Colombo expresses it—were "in a state of suspended animation,

capable of being quickened by the death of the donating spouse."

In their Lordships' opinion it is unnecessary to make any pronouncement upon either of these questions, for in the view of the Board, as of the Courts below, they do not form or truly bear upon the law of this case. And the entire rights of parties so far as they are in question in the case are, in their Lordships' opinion, regulated by Ordinance No. 15 of 1876.

That Ordinance is of fundamental importance in the settlement of matrimonial rights in Ceylon. It provides that the matrimonial rights of every husband or wife domiciled in the island and married after the date of the Ordinance "shall during the subsistence of such marriage or such domicile or residence be governed by the provisions in this Ordinance." By s. 6 this applies to movable, and by s. 7 to immovable, property. In the definition of matrimonial rights that expression means "the respective rights and powers of married parties in and about the management, control, disposition, and alienation of property belonging to either party, or to which either party may be entitled during marriage."

In these circumstances it seems to their Lordships that the attempt to regulate the matrimonial rights of parties domiciled or resident in Ceylon by a reference to the state of the law anterior to the Ordinance would not be warranted, except in the case, if ever such a case should arise, where ambiguity should appear in the language of the governing Ordinance, which ambiguity might be cleared up by such a reference. This view is expressly confirmed in reference to the first point already mentioned, namely, the argument submitted as to the communio bonorum, and the consequential reference to the jus mariti, and the husband's right of administration under the Roman-Dutch law. For by s. 8 of the Ordinance it is provided that after its proclamation there shall be no such community either in respect of movable or immovable property. By the comprehensive character of the Ordinance the point is thus disposed of.

Upon the second question raised a strenuous argument was, however, put forward to the effect that the Ordinance did not in fact by its terms cover the transaction contained in the agreement in the present case. That transaction could not be enforced so it was

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maintained, because it was a donation inter virum et uxorem. This necessitates a reference to s. 13. It provides : " It shall be lawful for any husband or wife, whether married before or after the proclamation of this Ordinance, notwithstanding the relation of marriage and notwithstanding the existence of any community of goods between them, to make or join each other in making, during the marriage, any voluntary grant, gift, or settlement of any property, whether movable or immovable, to, upon, or in favour of the other ; but all property so granted, gifted, or settled, and all acquisitions made by a husband or wife out of or by means of the moneys or property of the other shall, except as otherwise provided by section 11," (the reference is to the wife's jewels, &c., and to implements of trade and agriculture) " be subject to the debts and engagements of each spouse in the same manner and to the same extent as if such grant, gift, settlement, or acquisition had not been made or occurred."

This section, it will be observed, makes an end of the argument ; for donations between husband and wife are expressly made legal.

The true point in the case is, did the constitution of this annuity fall within the terms " voluntary grant, gift, or settlement of any property, whether movable or immovable " ? Their Lordships are of opinion that it did. It was of the nature of a grant, it was also of the nature of a gift, and it was also of the nature of a settlement. Their Lordships do not have any doubt that a correct conclusion has been reached by the Courts below upon this subject. There is no room for introducing any question of " consideration " in the sense of the law of England into the case. The expressions used in the Ordinance, taken together or singly, would appear to comprise the transaction which is now challenged. It was accordingly a perfectly legal transaction.

Sect. 19 of the statute was referred to as having a bearing upon the case. That section provides that all movable property to which a married woman should be entitled " during her marriage " should vest in her husband. The suggestion was that when the monthly payment of the annuity provided by the husband became payable to his wife she was disentitled to it, because by the force of the Ordinance it went back again to the husband and vested in him. It is sufficient to say of this argument that the marriage is at an end,

and that in no circumstances could the section regulate the relations of parties after the dissolution of the marriage.

Their Lordships will humbly advise His Majesty that the appeal be disallowed with costs.

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Solicitor for appellant: *Edward Dalgado.*

Solicitors for respondent: *Lee & Pembertons.*

[PRIVY COUNCIL.]

BRICKLES . . . . . APPELLANT;

AND

SNELL . . . . . RESPONDENT.

J. C.* 1916 *July* 25.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Specific Performance—Vendor and Purchaser—Time of Essence—Purchaser in Default—Undischarged Mortgage—Vendor able to convey.

The purchaser under an agreement for the sale of land in Ontario, which made time of the essence, was in default at the date fixed for completion, and the vendor thereupon cancelled the agreement. At that date there was a small mortgage upon the land. The mortgagee had consented and was willing to accept repayment upon the completion taking place; the purchaser had been informed that the mortgage would be paid off upon the completion and had raised no objection:—

Held, that the vendor was able and willing to convey at the date fixed for completion, and that the purchaser being in default was not entitled to specific performance.

APPEAL by special leave from a judgment of the Supreme Court of Canada (February 23, 1914) reversing a judgment of the Supreme Court of Ontario, Appellate Division (March 18, 1913), and restoring the judgment at the trial.

The question in the appeal was whether the respondent was entitled to specific performance of an agreement dated February 20, 1912, for the sale to him of land in Ontario. The terms of the agreement, which made time of its essence, and the facts are stated

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in the judgment of their Lordships. The trial judge found that the respondent was not in default and decreed specific performance. The Appellate Division set aside the judgment, holding that the respondent was in default, and that, time being of the essence, he was not entitled to a decree.

Upon appeal to the Supreme Court of Canada the judgment of the trial judge was restored by a majority. Davies, Duff, and Brodeur JJ., while finding that the respondent was in default, considered that the decision in *Kilmer* v. *British Columbia Orchard Lands* (1) governed the case, and that the respondent was entitled to specific performance although time was of the essence. Anglin J. delivered a dissenting judgment, with which the Chief Justice agreed, distinguishing that decision. The appeal is reported at 49 Can. S. C. R. 360.

1916. July 4, 6. *J. E. Jones*, for the appellant. Both Courts of Appeal found that the respondent was in default. Time being expressly made of the essence of the agreement, he was therefore not entitled to specific performance: *Steedman* v. *Drinkle* (2); *Stickney* v. *Keeble*. (3) In the former of those cases the decision in *Kilmer* v. *British Columbia Orchard Lands* (1) was explained and distinguished.

Tilley, K.C., for the respondent. There was a mortgage upon the land which was not discharged at the date fixed for completion. Although the mortgagee had consented to accept a repayment, there was nothing to compel her to do so. It was the duty of the vendor to obtain and register a reconveyance before the date fixed for completion. The legal title being outstanding upon that date, and the vendor not being able to compel a reconveyance, the appellant is not entitled to rely upon the clause making time of the essence: *Bellamy* v. *Debenham* (4); *Halkett* v. *Earl of Dudley* (5); *Brewer* v. *Broadwood* (6); *Stickney* v. *Keeble* (7); Sugden's Vendors and Purchasers, 14th ed., p. 425. The vendor was also in default in not supplying the form of mortgage for the balance of the purchase price. In any event the respondent was entitled to a return of the

(1) [1913] A. C. 319.
(2) [1916] 1 A. C. 275.
(3) [1915] A. C. 386.
(4) [1891] 1 Ch. 412.
(5) [1907] 1 Ch. 590.
(6) (1882) 22 Ch. D. 105, 109.
(7) 1915] A. C. 386, 403.

money which he had paid: *Steedman* v. *Drinkle*. (1) [*Sprague* v. *Booth* (2) was also referred to.]

J. E. Jones in reply. The return of the deposit was not claimed on the pleadings. There was a general claim for further relief, but that is not sufficient. In any case the money was paid as a deposit, and the respondent was therefore not entitled to its return: *Howe* v. *Smith*. (3)

July 25. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated February 23, 1914, allowing, by a majority of three to two, an appeal from a unanimous judgment of five members of the Appellate Division of the Supreme Court of Ontario dated March 18, 1913, setting aside the judgment at the trial dated November 26, 1912.

The action out of which the appeal arises was brought by the respondent against Isaac Brickles, since deceased, claiming specific performance of an agreement dated February 20, 1912, entered into between the respondent and Brickles, whereby Brickles agreed to sell and the respondent to purchase certain parcels of land in the township of Scarborough and county of York in the Province of Ontario for the sum of 7500 dollars to be paid and secured as follows: 500 dollars as a deposit on entering into the agreement, 2000 dollars on the acceptance of the title and the delivery of the deed of conveyance, and the balance, 5000 dollars, to be secured by a mortgage executed by the respondent of the property purchased to "be drawn on the vendor's solicitors' usual form" containing three specified clauses.

This agreement contained several special clauses. It is only necessary to state the purport and effect of those bearing upon the questions upon which the appeal turns. They were: (1.) The vendor was not bound to furnish any abstract of title, or any title deed or evidence of title, except such as he might have had in his possession. (2.) The purchaser was left to search the title at his own expense, had ten days to examine it, and if he did not object in writing within that period he was to be deemed to have accepted the

(1) [1916] 1 A. C. 275. (2) [1909] A. C. 576.
(3) (1884) 27 Ch. D. 89.

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title. (3.) If any valid objection was made to the title within that time the vendor was given a reasonable time to remove it. (4.) If the purchaser should make default in completing the purchase "in the manner and at the time mentioned," i.e., March 15, 1912, any money theretofore paid on account might at the option of the vendor be retained by him as "liquidated damages" and the contract, at his option, be put an end to, the vendor being entitled to resell the lands without reference to the purchaser. (5.) Time was made in all respects strictly of the essence of the contract.

The purchaser's solicitors, Messrs. Proudfoot, Duncan, Grant & Skeans, did not prepare the deed of conveyance, nor, apparently, did they claim or intend to do so. The vendor's solicitors, Messrs. Du Vernet & Co., took the matter in hand, and the purchaser and his solicitors apparently acquiesced in that arrangement. On February 21, 1912, the vendor's solicitors wrote to the solicitors of the purchaser to the following effect: "We understand that you are acting for William H. Snell, who is purchasing the above lands from our client, Isaac Brickles. Enclosed please find draft deed for approval." On the following day the vendor's solicitors again wrote to the purchaser's solicitors, enclosing a corrected description of the lands to be conveyed, and requesting them to detach the first page of the copy deed sent the previous day and to replace it with the page enclosed. On February 27 the vendor's solicitors sent to the same firm a third letter to the following effect: "Would you please return draft deed herein approved, with your objections to title, as our client will be in the office on Saturday."

These, however, were not the only communications which passed between the two firms of solicitors touching the carrying out of the contract. Mr. Melville Grant was the member of the firm of the respondent solicitors who had charge of the matter on behalf of his firm, and Mr. Ross the member of the other firm who had charge of the matter on behalf of the vendor.

Mr. Grant commenced to examine the vendor's title on February 22, 1912, and had his examination practically completed on the 29th of that month, when he received the last-mentioned letter, dated February 27, 1912. By the first week in March he had completed the searches and was ready to accept the title. There remained, however, one matter to be cleared up, in reference

to which he spoke to Mr. Ross over the telephone on March 5, namely, the existence of an undischarged mortgage of the property sold. He then informed Mr. Ross that the title was satisfactory, but that there was a mortgage which should be discharged. To this Mr. Ross replied that he would have it discharged on closing. On March 12 Mr. Ross telephoned to him that the vendor was in his (Mr. Ross's) office, that March 15 was the day for closing, and asked him to return the draft deed. To this Mr. Grant replied that his firm were ready to close, that the only point they wanted cleared up was the question of the mortgage. Mr. Ross said he would have this done, and then Mr. Grant replied that he would return the draft deed.

On the next day, the 13th, he brought out the deed from, presumably, his safe or some such place for the purpose of returning it, when he found he had nobody in his office to whom he could dictate the letter he intended to send with the deed. He therefore postponed the sending of it till the next day, Thursday, the 14th. He was, however, suddenly taken ill on that day, and was ill and unable to attend to the matter till Monday, the 18th. He then telephoned to Mr. Ross stating his firm were ready to close the matter and he would like to get it closed, and asking him if they could close. To which Mr. Ross replied that his client had been in with him, and that as the matter had not been closed on the 15th he had refused to carry out the agreement. On March 18 the vendor's solicitors wrote to the purchaser's solicitors a letter in the terms following: "The vendor called at our office to-day to ascertain whether this sale had been closed, as the date for closing was the 15th instant. We had to inform him that we had not heard from you, that you had not returned the draft deed, nor put in any objections to title. Under the agreement, 'in every respect time is to be strictly of the essence thereof.' The vendor has now instructed us to write you informing you and your client that on account of your default he will not carry out the contract, and the same is now rescinded."

These facts are all admitted. There is no controversy or dispute about them. From them it is clear that all parties concerned were anxious to carry out the sale, and that the delay was due mainly, if not entirely, to the sudden and unexpected illness of Mr. Grant. It is quite true that he might on Wednesday, the 13th, have himself

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written the letter he desired to send to the vendor's solicitors accompanying the deed, and not have postponed matters till next day. And it may well be he would have done so if he had apprehended his illness. If that be a fault it is certainly a trivial one; but, even so, the vendor is still entitled to stand upon "the letter of his bond." The writ was issued by the purchaser on April 23, 1912. The only specific relief it claims is specific performance of the agreement of February 20, 1912. There is a claim for such further relief as the nature of the case may require, but that can only mean such further relief as is ancillary to the main specific relief claimed.

It is, their Lordships think, very unfortunate that a claim in the alternative was not inserted for a return of the deposit of 500 dollars, or that, if not originally claimed, liberty should not have been asked to amend the pleading by inserting such a claim, so that there might have been a complete adjudication on all matters in dispute between the parties, and all further litigation have been prevented. That, however, has not been done, and their Lordships therefore can only deal with the issues raised by the pleadings as they stand. The trial judge held that the purchaser, the plaintiff, was not in default so as to entitle the defendant, the vendor, to rely upon the clause as to time being of the essence of the contract, and granted a decree for specific performance. The Supreme Court of Ontario set aside this decree and ordered and adjudged that the action should be dismissed. The Supreme Court of Canada, the Chief Justice and Anglin J. dissenting, reversed this decision and ordered that the judgment of the trial judge should be restored.

Davies and Duff JJ. expressly held that the case was governed by the decision of this Board in the case of *Kilmer* v. *British Columbia Orchard Lands* (1), and Brodeur J. concurred with them. The Court had not, of course, the advantage of having before it the judgment of this Board in the more recent case of *Steedman* v. *Drinkle* (2), delivered on December 21, 1915, in which the former case was explained, and it was pointed out that in it their Lordships must have been of opinion that the stipulation as to time being of the essence of the contract did not apply as the facts stood, since the defendant company had themselves agreed to extend beyond the day fixed the time for the payment of the instalment of the purchase-

(1) [1913] A. C. 319. (2) [1916] 1 A. C. 275,

money, the non-payment of which by Kilmer they relied upon as entitling them to enforce the forfeiture.

This was the feature which distinguished that case from the later case of *Steedman* v. *Drinkle*. (1) In the latter the purchaser made default in the payment of an instalment of the purchase-money. The vendor did not give any further time for the payment of it; on the contrary, he took advantage of the default immediately and cancelled the agreement. The Board decided that, as time was expressly made of the essence of the contract, specific performance of it could not be decreed in favour of the purchaser who was in default, but held that the forfeiture of the money paid under the contract was a penalty from which relief might be granted on proper terms. Faced with these difficulties, Mr. Tilley, counsel for the respondent, abandoned the grounds upon which the decision appealed from was based by the Supreme Court, but stoutly contended that the vendor was not entitled to treat the purchaser's omission to close the transaction on March 15, 1912, as a default giving the vendor the right to rescind, as the latter was not at that time ready, i.e., able, and willing to convey to the purchaser the fee of the property sold, inasmuch as, first, he had not before that day paid off and discharged the then existing mortgage on the land and procured the legal estate in the lands to be revested in him; and, secondly, as the vendor's solicitors' form of mortgage had never been delivered or tendered to the purchaser to enable his own solicitors to prepare the mortgage deed, by which the balance of the purchase-money was to be secured to the vendor.

Counsel was, having regard to the terms of the plaintiff's reply and joinder of issue, quite entitled to raise these points. The second is easily answered. It was the duty of the intended mortgagor, the respondent, to have the mortgage deed prepared. Neither he nor his solicitors ever asked the vendor or his solicitors to furnish him or them with the form prescribed. It was the business of the purchaser or his solicitors to procure it, and neither the vendor nor his solicitors were in any default in having omitted to furnish this form unasked. The first point is the more substantial. The mortgage to be discharged bore date November 1, 1904. It was made by Isaac Brickles to one Lucy Male, a married woman, wife of one

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George Male, to secure the repayment of a sum (not specified in the case) by instalments of 100 dollars each on November 1 in every year until the entire debt with interest at 5 per cent. was paid. In the spring of 1912 something over the trifling sum of 200 dollars remained due on this mortgage. The entire sum due about November 1, 1912, for principal and interest was 300 dollars, which was then paid in full, and a discharge signed by the mortgagee. The hearing did not take place till November 26 following. The vendor was at that date undoubtedly ready, i.e., able, to convey the interest purchased. It is quite true that the vendor had not on or before March 15 any legal power to compel Mrs. Male to accept against her will the unpaid balance of the mortgage debt with the interest thereon, so as to vest in himself the interest in the lands he had contracted to sell, but a written statement signed by her husband, George Male, dated in the month of November, 1912, and an affidavit of the same date made by his wife were, by consent, received in evidence at the trial as proof of the facts stated in them. From the first it appeared that Brickles about the time the sale was contemplated told George Male that he was about to sell these lands, and asked Male if he would consent to receive the mortgage money ; he replied in the affirmative and afterwards informed his wife of the offer, and she was satisfied.

Mrs. Male in her affidavit stated that she was prepared at any time, upon payment of the principal and interest due under the mortgage, to execute a discharge therefor in favour of Isaac Brickles, and that had she been called upon on or before March 15, 1912, to do so would have done so. It is to be borne in mind that on March 4 Mr. Ross informed Mr. Grant over the telephone that he, Ross, would have "a discharge of this mortgage on closing." Mr. Grant did not suggest that this would be too late. On the contrary, he apparently acquiesced in the arrangement. That assurance was repeated by Mr. Ross on March 12, 1912, and again no objection was made to it by Mr. Grant.

A very simple procedure for the discharge of mortgages and the revesting in the mortgagor of his former estate in the property mortgaged is provided by ss. 62 and 67 of the Registry of Deeds Act (R. S. Ont., 1914, c. 124). A form of document called a discharge has merely to be filled up and authenticated in the manner prescribed,

On this being duly registered the mortgage debt is discharged and the legal estate revested in the mortgagor.

Their Lordships are clearly of opinion that the vendor was not bound to have the mortgage discharged and the legal estate revested in him before March 15, 1912. It would have been quite sufficient to have had these things done immediately before the closing of the transaction on that day, and so the solicitors for the parties obviously understood and intended. Mr. Tilley, however, urged that even though the documents admitted should be taken as satisfactory proof that Male and his wife had consented before that date to the discharge of the mortgage, they might at any moment up to the signing of the discharge have changed their minds and refused to sign it, and as Brickles could not have compelled them not thus to change their minds he was not in point of law ready on March 15 to complete. No reason was suggested why they should change their minds. In fact they apparently had not done so, as they were paid off in full before November 1, 1912. There was no evidence given to suggest that they ever contemplated such a change; and the question is, must it be held, in the absence of such evidence, that the vendor was disabled from conveying the interest sold owing to the bare possibility that a contingent and improbable event might conceivably occur? No authority was cited which went to such a length as that.

In the case of *In re Head's Trustees and Macdonald* (1) a testator, after giving to his wife a life estate in his real and personal estate, authorized but did not direct his trustees to pay his debts, and did not charge his real estate with the payment of his debts, so that the trustees had not, during the lifetime of the widow, any power to sell the real estate, but he did empower them to sell the real estate after her death and divide the proceeds amongst his children. The trustees entered into a contract to sell some portion of the real estate, the contract to be completed on January 24, 1890. On that day the vendors had not obtained the concurrence of the beneficiaries, and the purchaser repudiated the contract and asked for a return of the deposit. On January 29 the solicitor for the vendors wrote to say that he could make a good title with the concurrence of the beneficiaries which the vendors would procure, and the Lords

(1) (1890) 45 Ch. D. 310, 317.

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Justices (Fry and Lopes) certainly seem to have indorsed the opinion that if the vendors had at once, when the objection to the title was made, offered the concurrence of the beneficiaries, shown that they could and would concur, and gave an opportunity of investigating their title, the trustees might have forced the purchaser to take the title. In argument in that case it was urged on behalf of the purchaser, on the familiar authority of *Forrer* v. *Nash* (1), that, the vendors not having been able to convey nor to force the concurrence of the beneficiaries, the purchaser was not bound to wait to see whether that concurrence could be obtained, but Fry L.J. said: "Objection having been taken to the title, the vendors said that they would obtain the concurrence of the beneficiaries. Now, if that had been done at an early stage of the proceedings, and if the trustees had been able to show that the beneficiaries did in fact consent to join, and an opportunity had been given of investigating their title, and it had been shewn that they would concur in reasonable time, it is by no means clear to me that the vendors might not have enforced their contract. It is not necessary to decide that point." In the present case the purchaser's solicitors knew of the existence, and presumably of the nature, of this mortgage; they apparently satisfied themselves as to that. They never made any requisition as to proof of the mortgagee's title. They merely required that the mortgage should be discharged. It could only be discharged with the consent of the mortgagee or her assigns. They were assured it would be discharged. The vendor had obtained the legal power and authority to discharge it. There is no suggestion that that power and authority, if unrevoked, would not be sufficient; the only infirmity about it was that it was revocable at the option of those who conferred it. This case seems a much stronger one in favour of the vendor's ability to convey than that of *In re Head's Trustees and Macdonald.* (2)

In *Esdaile* v. *Stephenson* (3) the Master reported that the vendor could make a good title if a widow would release her jointure, which was secured by a term. The vendor undertook by parol before the Master to procure her to release it. This was held to be insufficient. But that case is quite distinguishable from this. The widow

(1) (1865) 35 Beav. 167. (2) 45 Ch. D. 310.
(3) (1822) 6 Madd. 366.

was not shown to have ever given her consent to release her jointure.

The respondent cited several authorities, amongst others the following: *Brewer* v. *Broadwood*. (1) In that case the purchaser had bought an agreement for a lease. He repudiated on the ground that the agreement was voidable at the will of the lessor unless certain works were completed on the land within a certain time; the work had not been completed within the time, and the agreement was therefore voidable; but on the day on which the contract was repudiated the lessor consented, in case certain rent was paid up within a week, to extend the time for finishing the uncompleted work to over seven months. Here the purchaser bought a valid agreement for a lease. The vendor had never that to sell. He had only a voidable lease to sell. The rent stipulated for was never paid, the condition on which further time was given was never performed. The purchaser was held to have been entitled to repudiate. That case does not establish that a consent to a certain thing which, if unrevoked, would validate a vendor's title is ineffectual for that purpose if, though unrevoked in fact, it is revocable in character. In *Bellamy* v. *Debenham* (2) the plaintiff sold a house, but on copyhold land, subsequently enfranchised, the mines, &c., being reserved to the lord of the manor, and never vested in the vendor. On the purchaser discovering that the vendor was not entitled to the mines he repudiated before the day fixed for completion, June 24, 1889. He persisted in that, and though the vendor before that date began to negotiate for the purchase of the mines, he did not acquire them till after action brought and long after June 24, 1889. It was held that the vendor was not entitled either to a decree for specific performance or for damages. The case of *Sprague* v. *Booth* (3) does not apply to the present case.

These authorities do not, in their Lordships' opinion, support the respondent's contention on this point. They think he has failed to show that the vendor was not, in fact, on March 15, ready, i.e., able, to convey the property purchased. They think, therefore, on the whole, that the appeal succeeds, that the decree appealed from was erroneous and should be reversed, and the decree of the

(1) 22 Ch. D. 105. (2) [1891] 1 Ch. 412.
(3) [1909] A. C. 576.

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Supreme Court of Ontario dated March 18, 1913, restored. They will humbly advise His Majesty accordingly. The respondent must pay the costs here and in the Supreme Court of Canada.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondent: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

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COMMERCIAL CABLE COMPANY . . . . APPELLANTS;

AND

GOVERNMENT OF NEWFOUNDLAND . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Newfoundland—Governor in Council—Contract—Invalidity—Approval by House of Assembly—Audit Act (62 & 63 *Vict. c.* 34, *Newfoundland*), *s.* 79.

By rule 278 of the rules and orders for the proceedings of the House of Assembly of Newfoundland, made under s. 4 of the Representation Act, 1892 (Newfoundland), "In all contracts extending over a period of years and creating a public charge, actual or prospective, entered into by the Government, there shall be inserted the condition that the contract shall not be binding until it has been approved by a resolution of the House."

By s. 79 of the Audit Act (62 & 63 Vict. c. 34, Newfoundland) the Governor in Council, subject to conditions therein provided, may remit any duty or toll payable to the Crown imposed by an Act of the Colony.

In 1909 the Governor in Council entered into a contract with the appellants under the great seal of Newfoundland for the extension of a transatlantic cable to Newfoundland and ancillary matters; the contract, which was to continue for twenty-five years, provided for an annual payment by the Government to the appellants and that the appellants should have entry duty free for all cables, instruments, tools, and supplies necessary for carrying it out, but did not contain the provision required by rule 278. The cable was laid and certain other work carried out, but upon a change of the Ministry the new Government repudiated the contract and declined to submit it for legislative sanction. By the letters patent under which the Governor was appointed his powers were

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* *Present:* LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

to be exercised according to (inter alia) " such laws and ordinances as are or shall be in force in Our said Colony " :—

Held, (1.) that rule 278 of the House of Assembly, above set out, was binding upon the Executive as part of the Constitution of Newfoundland ; (2.) that the prerogative power of the Governor under the letters patent was subject to the restrictions imposed by the constitutional practice of the Colony ; (3.) that the contract accordingly was not binding upon the Government in the absence of the approval of the House of Assembly ; (4.) that the power of the Governor in Council under 62 & 63 Vict. c. 34, s. 79, extended only to the remission of duties or tolls in a particular case and not to granting a prospective and continuing exemption.

APPEAL from a judgment of the Supreme Court of Newfoundland (December 15, 1914).

On November 11, 1912, the appellants presented a petition to the Supreme Court of Newfoundland under the Judicature Act, 1904 (4 Edw. 7, c. 3, Newfoundland), s. 163, claiming against the respondents two sums of 12,000 dollars and 10,916 dollars by virtue of an agreement, dated February 18, 1909, entered into with them by the Governor in Council (thereinafter referred to as the Government) under the great seal of Newfoundland and countersigned by the then Prime Minister and Colonial Secretary. The answer of the Attorney-General alleged that the agreement was not valid or binding upon the Government without the approval of the Legislature and that the Legislature had not approved it. The provisions of the agreement and the facts of the case appear from the judgment of their Lordships.

Representative government was granted to Newfoundland by the Imperial statutes 2 & 3 Will. 4, c. 78, and 5 & 6 Vict. c. 120. Responsible government was established under a despatch dated February 21, 1854, from the Duke of Newcastle to General Hamilton (Parliamentary Papers, vol. 7, Accounts and Papers). There is no statute defining the Constitution of the Colony.

The Supreme Court of Newfoundland (Johnson and Emerson JJ., Sir W. Horwood C.J. dissenting) dismissed the petition, the majority holding that the agreement was invalid in the absence of the approval of the Legislature.

1916. July 18, 20. *Sir R. Finlay, K.C.*, and *Hon. M. Macnaghten* (for *Geoffrey Lawrence*, serving with His Majesty's

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Forces), for the appellants. The Governor in Council, acting with the concurrence of the Ministers, has power to enter into contracts for the public service. Rule 278 of the House of Assembly does not affect that power; if it is more than a rule of the House it is outside the scope of s. 4 of the Representation Act, 1892, by which it was authorized. The Legislature, no doubt, had power to disaffirm the contract, but, there being no provision in it making legislative approval necessary, it is valid unless disaffirmed. *Churchward* v. *Reg.* (1) is distinguishable. The contract in that case was construed as being conditional upon Parliament supplying the funds necessary; here no such condition can be implied. The power under s. 163 of the Judicature Act, 1904, of Newfoundland to proceed against the Government upon a contract excludes the inference that that condition is to be implied. The Crown has prerogative power to bind the Colony. The present matter was within the sphere of the commission of the Governor acting in Council. The establishment of representative government by Imperial statute did not affect the common law power of the Governor. Although the Governor cannot appropriate the revenues of the Colony to a contract he has power to contract for their application to specific public services. There was power under s. 79 of the Audit Act (62 & 63 Vict. c. 34, Newfoundland) to remit the duties. The Treasury Board is included in the Executive Council, whose minute amounts to a recommendation by the Board. [*Musgrave* v. *Pulido* (2), *Dunn* v. *Macdonald* (3), *Williams* v. *Howarth* (4), and *Commercial Cable Co.* v. *Attorney-General of Newfoundland* (5) were referred to.]

Gordon Hewart, K.C., and *Barrington-Ward* (for *Raymond Asquith*, serving with His Majesty's Forces), for the respondents, were not called upon.

July 31. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from the conclusion come to by a majority of the Supreme Court of Newfoundland. What has to be determined is whether the appellants, who are an American company incorporated in the State of New York,

(1) (1865) L. R. 1 Q. B. 173.
(2) (1879) 5 App. Cas. 102.
(3) [1897] 1 Q. B. 555.
(4) [1905] A. C. 551.
(5) [1912] A. C. 820.

are entitled to recover two sums of 12,000 dollars and 10,916 dollars alleged to be due under an agreement under the great seal of Newfoundland, dated February 18, 1909, to which the parties were the appellants and the Governor of Newfoundland in Council.

The agreement was made under the following circumstances. Prior to 1905 the appellants owned and worked five submarine cables laid between Waterville in Ireland and Canso in Nova Scotia. None of these cables reached to Newfoundland. By an agreement dated August 26, 1905, made between the appellants and the Government of Newfoundland, and subsequently confirmed by statute of the Legislature of Newfoundland (6 Edw. 7, c. 10), to which it was scheduled, the Government agreed to grant to the appellants, on certain terms and conditions, the right to land any of its through cables in Newfoundland.

In September, 1905, a cable had been laid by the appellants from Port aux Basques, on the south coast of Newfoundland, to Canso, in Nova Scotia. This cable became the property of the Government, who worked it. It was in order to develop the system so brought into existence that the agreement of August 26 was entered into. That agreement provided for the maintenance of the new cable and for exchange of traffic. It also provided that the Government should grant to the appellants the right to land any of their through cables in Newfoundland on certain terms and conditions, and for grants of cable stations and wayleaves. The duration of this agreement was to be ten years.

Later on, in 1909, Sir Robert Bond, who was then Premier of Newfoundland, entered into negotiations with the appellants with a view to the appellants landing one of their transatlantic cables at St. John's, and these negotiations culminated in the agreement of February 18, 1909, now in controversy. By this agreement the appellants contracted to cut one of their transatlantic cables and extend it to Newfoundland and thence to New York, and also to establish a cable station at St. John's. The duration of the agreement of August 26, 1905, was to be extended to twenty-five years. The appellants were to pay the Government a certain proportion of their receipts for messages. The Government were to pay to the company 4000 dollars annually for the facilities thus to be afforded,

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and to grant them the right to land the new cable in Newfoundland, as well as lands for cable stations and wayleaves for the cables. The appellants were to have entry duty free for their materials and appliances, and the contract was to last for twenty-five years.

The appellants selected a landing-place and entered into a contract with a construction company for the manufacture and laying of the new cable. The cable appears to have been made and landed, and some work was done by the appellants towards establishing a cable station at St. John's. The Government used the cable on certain occasions, but it appears to their Lordships that this was done under special arrangements, and that it cannot be taken to have amounted to an adoption in itself making the contract binding on the Government.

For the purpose of installing the new cable the appellants imported into Newfoundland certain articles which would have been admitted duty free had the contract been carried out by the Government. But the Government has claimed duty on these articles on the footing that the contract is not binding, and the appellants have paid in respect of duties sums amounting to 10,916 dollars. This is the second amount claimed, and it is claimed as recoverable by the appellants under their contract. They allege that they are entitled to have it repaid to them and to receive the first item of 12,000 dollars, being the amount for three years of the annual subsidy of 4000 dollars.

In 1909 the Government of Sir Robert Bond, who had negotiated the agreement in controversy, went out of office, and a new Government came in. The new Government was dissatisfied with the agreement, announced that it regarded it as not being binding in the absence of legislative sanction, and declined to recommend it to the House of Assembly for ratification. As a consequence, the Legislature of Newfoundland has not ratified the agreement, as it did in the case of the agreement of 1905.

There is no doubt that the agreement in controversy was executed with all due solemnities so far as the Governor in Council was concerned, and the question is whether it is binding in the absence of sanction from the Legislature. With the policy of the new Administration in Newfoundland in repudiating it their Lordships have no concern. The Administration may have acted harshly or they may

have been simply doing a public duty. Such a question is not one for a Court of law, but is a domestic issue for the Government of Newfoundland and those to whom they are responsible. The only point before this Board is whether the claims of the appellants in proceedings which are analogous to a petition of right ought to succeed as claims valid in point of law. The question turns on whether the then Government of Newfoundland had authority to make a contract, binding apart from legislative sanction, which would entitle the appellants to claim the sums in question under the terms of such a contract. In order to answer this question it is necessary to examine the position of the Governor of Newfoundland when, acting in Council, he executed the agreement.

Newfoundland has not had its Constitution defined by Imperial statute after the fashion of Canada and the Canadian provinces, but it has for many years possessed not only representative but responsible government. Its elected Chamber has assumed the form of a House of Assembly, which has regulated its own proceedings by rules, made under the authority of one of its own statutes which precludes alterations of these rules except by a vote of two-thirds of the members. One of these rules is that in all contracts extending over a period of years and creating a public charge, actual or prospective, entered into by the Government, there shall be inserted the condition that the contract shall not be binding until it has been approved by a resolution of the House. Their Lordships are of opinion that this rule is part of the Constitution of Newfoundland, and is binding on the Executive, which is responsible to the Legislature and which was of course party to the statute under which the rule was made.

There is another statute which was invoked in the argument for the appellants as relating to the subject-matter of the agreement of 1909. It is the Newfoundland statute of 62 & 63 Vict. c. 34, which, by s. 79, enables the Governor in Council, on the recommendation of the Treasury Board, to remit any duty or toll payable to the Crown and imposed and authorized to be imposed by an Act of the Colony. But, looking at the context of the section, their Lordships do not read the statute as applying to a contract such as that before them, which is dealing not with remission in a particular case, but with an exemption of a prospective and continuing character. Such

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an exemption would, in their opinion, require the special sanction of the Legislature.

Turning to the position of the Governor, it is plain that, according to well-settled principles, he is not a viceroy in the sense of being a person to whom the full prerogative power of the Crown has been delegated. His capacity is defined and limited by his commission and instructions. The commission which defines the powers of the Governor is contained in letters patent of March 28, 1876, which enable him, with the advice and consent of the Legislative Council and Assembly of the Colony, to make laws for the public peace, welfare, and good government of the Colony. They authorize him to "do and execute in due manner all things that shall belong to his said command, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of these present letters patent, and of such commission as may be issued to him under Our sign manual and signet, and according to such instructions as may from time to time be given to him under Our sign manual and signet, or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and according to such laws and ordinances as are or shall hereafter be in force in Our said Colony." The letters patent also set up an Executive Council, to be nominated with the approval of the Legislature of the Colony, and a Legislative Council, not exceeding fifteen in number.

Their Lordships think it clear that the Governor is by these provisions subjected to constitutional restriction, and that any persons dealing with him, whether or not they actually know the character of his authority, must be taken to deal subject to such restriction. No doubt, if he chose in unambiguous language to bind himself by any contract personally, the Governor could do so and take the consequences, but he could not by so doing bind the Parliament and the people over whom he is only appointed to exercise authority subject to the constitutional conditions already referred to. And when he makes a contract it is well settled that the presumption is that he contracts in his public capacity and subject to the particular restrictions which the constitutional practice of the Colony imposes. These restrictions every one transacting public business with him must be taken to accept in so

transacting, and any contract entered into with him in his public capacity will be presumed, unless the contrary plainly appears, to have been entered into on this footing.

From what has been said it follows that the agreement of February 18, 1909, must be presumed, from the character of its subject-matter, to have been made on the footing that it would be submitted to the Legislature of the Colony for its approval, and that it was not to become a binding agreement in the absence of such approval. The agreement must, moreover, be read as a whole, and as it was beyond the power of the Executive to make it binding in the points already indicated, it cannot be made binding piecemeal. What view the Legislature might have taken had it been properly submitted is a topic into which no Court of law can enter, and no damages can be recovered for breach of any implied promise so to submit it. For all grants of public money, either direct or by way of prospective remission of duties imposed by statute, must be in the discretion of the Legislature, and where the system is that of responsible government, there is no contract unless that discretion can be taken to have been exercised in some sufficient fashion. Their Lordships will therefore humbly advise His Majesty that the appeal fails and should be dismissed with costs.

Solicitors for appellants : *Regge & Ackroyd.*
Solicitors for respondents : *Burn & Berridge.*

[PRIVY COUNCIL.]

J. C.* 1916 Aug. 1.

CORPORATION OF THE CITY OF TORONTO Appellants;

AND

CONSUMERS' GAS COMPANY OF TORONTO Respondents.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada (Ontario)—Municipal Corporation—Construction of Sewer—Interference with Gas Main—"Land"—Injurious Affection—Municipal Act, 1913 (3 & 4 *Geo.* 5, *c.* 43, *Ontario*), *s.* 321 (*b*); *s.* 325, *sub-s.* 1.

The appellants, in the exercise of their statutory powers, constructed a sewer under a street in Toronto, of which the freehold was vested in them. The construction made it necessary to lower a gas main laid by the respondents under power contained in their Act of incorporation, 11 Vict. c. 14 (Canada). By s. 325, sub-s. 1, of the Municipal Act, 1913 (Ontario), where land is expropriated by a municipal corporation for its purposes, or is injuriously affected by the exercise of its statutory powers, compensation is to be made to the owner. By s. 321 (*b*) of that Act "land" includes a right or interest in, and an easement over, land:—

Held, that the gas main was within the definition of "land" in s. 321 (*b*), and that the appellants were liable for the cost of lowering it as injurious affection under s. 321, sub-s. 1, above mentioned.

Appeal from a judgment of the Supreme Court of Ontario, Appellate Division (September 21, 1914), reversing the judgment of the York County Court.

The respondents in the years 1909 and 1910, under powers contained in their incorporating Act, 11 Vict. c. 14 (Canada), laid a gas main under Eastern Avenue, a street in the city of Toronto. The material provisions of the Act are set out in the judgment of their Lordships. The soil and freehold of Eastern Avenue were vested in the appellants by s. 433 of the Municipal Act, 1913 (3 & 4 Geo. 5, c. 43, Ontario), and had been vested in the municipality by previous statutes since 1858. The appellants under s. 398 of the Municipal Act, 1913, and under previous statutes had power to pass by-laws for constructing sewers and for acquiring land for that purpose. In

* *Present:* Lord Buckmaster L.C., Viscount Haldane, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Parmoor.

1913 the appellants were constructing a sewer, the construction of which made it necessary that the respondents' gas main in Eastern Avenue should be lowered seven feet so as to pass underneath the sewer. The respondents declined to lower their gas main unless they were paid the cost of doing so. To avoid delay in the construction of the sewer it was arranged that the respondents should do the work necessary and that the appellants should pay to them, under protest, the cost incurred and bring an action to recover it. The payment was accordingly made and the present action brought.

The trial judge gave judgment in favour of the appellants.

The Appellate Division reversed that judgment and dismissed the action (32 Ont. L. R. 21). The learned judges held that the gas main was " land " within the meaning of the definition in s. 321 (*b*) of the Municipal Act, 1913, and that the respondents under s. 325, sub-s. 1, of that Act were entitled to the cost of lowering as damages for injurious affection. The sections referred to are set out in the judgment of their Lordships.

1916. July 6. *Sir R. Finlay, K.C.*, and *Geary, K.C.*, for the appellants. The soil of the streets is vested in the appellants under s. 433 of the Municipal Act, 1913 (Ontario) ; it had vested in them under previous statutes since 1858. The right of the respondents to lay and maintain their gas pipes under the streets is subject to the overriding right and duty of the appellants to construct sewers for the public benefit : *New Orleans Gas Light Co.* v. *New Orleans Drainage Commission* (1) ; *National Waterworks Co.* v. *Kansas City* (2) ; *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works.* (3) The respondents' right being subject to this limitation, they were not injuriously affected so as to be entitled to compensation under s. 325 of the Municipal Act, 1913. The decision in *Consumers' Gas Co.* v. *Toronto Corporation* (4), therefore, does not affect the question.

Hellmuth, K.C., and *Hon. M. Macnaghten,* for the respondents. There is no English or Canadian authority to support the principle of paramount right contended for. The statutes place all public utilities whether owned by a municipal corporation or otherwise upon

(1) (1905) 197 U. S. 453.
(2) (1886) 28 Fed. Rep. 921.
(3) [1898] 2 Ch. 603.
(4) (1897) 27 Can. S. C. R. 453.

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an equal footing. The respondents' gas main was laid under their incorporating Act, 11 Vict. c. 14, prior to the soil of the streets vesting in the appellants. In any case the gas main, or the respondents' right to maintain it where it was laid, is within the definition of land in s. 321 (*b*) of the Municipal Act, 1913 : *Consumers' Gas Co.* v. *Toronto Corporation.* (1) Upon its expropriation or injurious affection the respondents were entitled to compensation under s. 325, sub-s. 1, of that Act. [Public Utilities Act, 1913 (3 & 4 Geo. 5, c. 41, Ontario), ss. 44 and 51, and the Interpretation Act (R. S. Ont., 1914, c. 1), s. 7 (13.), were also referred to.]

Geary, K.C., replied. *Consumers' Gas Co.* v. *Toronto Corporation* (1) was wrongly decided.

Aug. 1. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. The action out of which this appeal arose was brought by the appellants, the City of Toronto, against the respondents, the Consumers' Gas Company, to recover the cost of lowering a twenty-inch gas main belonging to the defendants on Eastern Avenue at or near the intersection of that avenue with Carlaw Avenue, both avenues being public streets of Toronto. There is no question of the propriety of the construction by the city of the public sewer on Carlaw Avenue, nor of the fact that such construction necessitated the lowering of the gas main. These operations were not brought about in the interest or for the purposes of the gas company, but of the corporation, which, however, was acting undoubtedly in the public interest. Upon whom—the city or the gas company—is the expense of the displacement and replacement of the gas main to fall ? This is the question in the case.

The trial judge gave judgment in favour of the appellants. Upon an appeal by the respondents to the Supreme Court of Ontario that Court allowed the appeal and dismissed the action. Although the amount involved is small, the question is of importance, and its settlement will regulate the general point of liability as between the city and the gas company for the cost of operations of a similar nature.

The Board entertains no doubt that the learned judges of the

(1) 27 Can. S. C. R. 453.

Supreme Court have come to a correct conclusion. In the opinion of their Lordships it is within the right of the city in constructing a drain to order the lowering of the gas main, but it is the duty of the corporation to pay the cost of the operation.

The gas company was incorporated in the year 1848 by 11 Vict. c. 14. Under s. 1 of the statute it was given power to purchase, take, and hold "lands, tenements, and other real property for the purposes of the said company." By s. 13 it was made lawful for the company, after two days' written notice to the city, "to break up, dig, and trench so much and so many of the streets . . . . as may at any time be necessary for the laying down of the mains and pipes to conduct the gas . . . . or for taking up, renewing, altering or repairing the same." Provision was made by the same section against unnecessary damage being done and uninterrupted passage being kept through the streets, the work having to be finished and the replacing of the streets accomplished without unnecessary delay. By s. 15 of the statute the location of the gas pipes was dealt with, and it was provided that they should be three feet from any other gas pipes; and with regard to their situation, if any differences arose on that point, these were to be settled by the surveyor.

Once the pipes were laid by statutory authority, then they, in fact, became partes soli. There seems little reason to doubt that in the year 1848, when the gas company thus laid down its pipes, the freehold of the ground was in the Crown. Whether this was so or not would not appear to make any difference as to the exact right acquired under the gas company's Act of 1848; but it is a circumstance worthy of note that the present demand by the corporation is a demand founded upon a right which vested in it or its predecessors subsequent to those rights which were created by statute in the gas company itself.

In *Metropolitan Ry. Co.* v. *Fowler* (1) Lord Watson, in dealing with the legal position in reference to a tunnel constructed by that railway company under part of the city of London, observed, "the tunnel has become pars soli in the strictest sense of the words. If it had been constructed by one who was proprietor a centro usque ad cœlum, it would have passed, in the absence of exception, with his conveyance of the land. As matters stand the owners of the soil,

(1) [1893] A. C. 416, 425.

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whoever these may be, are practically divested of interest in that part of it which has been converted into tunnel. They have no right to occupy or to interfere with it in any way whatever; and their exclusion is not for a period limited, but for all time coming." And in another portion of his judgment he said: "I think the tunnel is as much 'land' as the highway itself or any other part of the soil beneath." The same principle would appear to apply to the gas main in the present case, laid down as it was by virtue of the authority of the Act of 1848.

It is now expedient to see what are the powers relied upon by the appellants as entitling them to charge upon the gas company the cost necessarily incurred by them of lowering the pipes of that company. One ground is thus stated by the learned trial judge, whose opinion is that the corporation "has the paramount duty of providing for the health of the citizens with reference to the construction of sewers on their streets, and that the defendants have only the right to use the streets for their own benefit, subject to that paramount authority." Certain decisions of Courts in the United States reports in support of this doctrine of paramount right are quoted.

Their Lordships are of opinion that there is no such doctrine of paramount right in the abstract, and that unless legislative authority, affirming it to the effect of displacing the rights acquired under statute as above described by the respondents, appears from the language of the Statute-book, such displacement or withdrawal of rights is not sanctioned by law. In this, as in similar cases, the rights of all parties stand to be measured by the Acts of the Legislature dealing therewith; it is not permissible to have any preferential interpretation or adjustment of rights flowing from statute; all parties are upon an equal footing in regard to such interpretation and adjustment; the question simply is, what do the Acts provide?

Before dealing with the statute specifically founded upon as justifying the position and claim of the city, namely, that of 1913, it may be convenient to state that in 1834, by 4 Will. 4, c. 23, the limits of the town of York were extended and the town was erected into a city under the name of the city of Toronto. Under s. 22 of that statute it was given full power with regard to the surface of the streets and with regard to the repair, &c., thereof. There was in

that statute no vesting with regard to the soil. In the year 1849, by the Act 12 Vict. c. 80, re-enacted by c. 81, it was provided by s. 31 that the corporation had power to make by-laws for the erection, construction, or repair of such drains as the interest of the inhabitants required to be erected, &c., at the public expense. This Act was subsequent in date to the gas company's statute. It was repealed by 22 Vict. c. 99, but under the latter statute power was given to make regulations "for sewerage or drainage that may be deemed necessary for sanitary purposes." It was, however, not until that date, namely, 1858, that by that statute all roads, streets, and highways were vested in the municipality.

This brief historical sketch has been ventured upon in order to make it clear that the position of the gas company cannot in any sense be looked upon as having been in the nature of encroachment upon existing rights, statutory or otherwise, of the city of Toronto.

The Act put forward, however, in support of the respondents' case is the existing Municipal Act of 1913. By s. 325, sub-s. 1, of that Act it is provided: "Where land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this Act, or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated, or where it is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom, beyond any advantage which the owner may derive from any work for the purposes of, or in connection with, which the land is injuriously affected."

It is, however, extremely important to ascertain what the word "land" here mentioned embraces. Unless a careful attention be given to this point the danger might be incurred of applying principles laid down in England which extend and were meant to apply solely to land with the specific limitations of definition in the English Lands Clauses Act to cases where these specific limitations are not found or where the definition is different.

Under the English Lands Clauses Act, 1845, s. 3, the definition is, "The word 'lands' shall extend to messuages, lands, tenements, and hereditaments of any tenure." In the present case the definition

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of "land" is contained in s. 321 (*b*) of the Municipal Act, 1913. The whole of that section, dealing with not only land, but the terms "expropriation" and "owner," is important. The section reads in this way: "In this part: (*a*) 'Expropriation' shall mean taking without the consent of the owner, and 'expropriate' and 'expropriating' shall have a corresponding meaning. (*b*) 'Land' shall include a right or interest in, and an easement over, land. (*c*) 'Owner' shall include mortgagee, lessee, tenant, occupant, and a person entitled to a limited estate or interest in land, a trustee in whom land is vested, a committee of the estate of a lunatic, an executor, an administrator, and a guardian."

The reasons have already been assigned for holding that the space occupied by the gas mains and the gas mains themselves of the respondents are of the nature of land in its ordinary sense. It must, however, be added that in any view the definition of "land" in the Municipal Act unquestionably includes them. For it can hardly be denied that the words "a right or interest in, and an easement over, land" would embrace the right of the gas company to have their pipes remain, and to have the interest and use of them and the space occupied by them undisturbed; nor can it be doubted that the company falls within the definition of owner as just cited. It thus appears plain that the taking without the consent of the owner of this right or interest becomes subject to the provisions contained in s. 325. One of those provisions is that compensation is to be made where the land (thus including a right or interest in the land) is injuriously affected by the exercise of such powers. The corporation is accordingly liable in respect of such injurious affection. All that is asked in the present case is that the displacement and replacement of the pipes shall be paid for. Without compensation the city would not be empowered to make such displacement, and the measure of injurious affection, namely, the cost of the operation, would seem to be fully covered accordingly by the terms of the Act.

Their Lordships will humbly advise His Majesty that the appeal should be disallowed. The appellants will pay the costs.

Solicitors for appellants: *Freshfields.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(In Prize.)

Prize Court—Jurisdiction—Freight—Abandonment of Voyage—Seizure of Cargo—Informal Release.

The jurisdiction of the Prize Court which attaches upon a capture or seizure in prize and extends to all incidental matters, such as questions of freight, is not terminated by the ship or cargo being handed over to claimants without a formal release by the Court under Order XIII. of the Prize Court Rules.

A British ship which has abandoned a voyage from the United States to Hamburg in consequence of the outbreak of war is not entitled to be awarded by the Prize Court any compensation in lieu of freight in respect of cargo seized at an English port subsequently to the abandonment of the voyage.

Appeal from an order of the Prize Court (England).

The appellants, the Phosphate Mining Company, who were an American corporation, before the outbreak of war shipped at Tampa in Florida 2550 tons of phosphate rock in the British ship *St. Helena*, owned by the respondents, the St. Enoch Shipping Company, Limited, to be delivered under a bill of lading at Hamburg to the appellants' order on payment of the freight therein provided. The ship arrived off the Lizard on August 7, 1914, and in consequence of the outbreak of war between Great Britain and Germany abandoned the voyage and proceeded to Manchester. The cargo, including the phosphate rock, and freight were there seized as prize on August 12, 1914, and the phosphate rock was subsequently discharged into the warehouses of the Manchester Ship Canal Company on account of the Admiralty Marshal. In September, 1914, the phosphate rock was released to the appellants by the Marshal under circumstances stated in the judgment. The canal company, having received statutory notice from the respondents

* *Present:* Lord Parker of Waddington, Lord Sumner, Lord Parmoor, and Lord Wrenbury.

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that they claimed a lien for freight and charges, delivered the phosphate rock to the appellants against a deposit of 1680*l.*, the amount so claimed.

On December 30, 1914, the respondents commenced an action against the appellants in the King's Bench Division claiming that they were entitled to the amount deposited. The action was heard and dismissed by Rowlatt J. on April 27, 1915. The learned judge held that, the completion of the voyage by the ship having become illegal and impossible, no freight was due either under the bill of lading or as reasonable remuneration. The respondents appealed, but subsequently withdrew their appeal.

On September 2, 1915, other portions of the cargo of the *St. Helena* were condemned by the Prize Court, and the President gave the respondents leave to apply with reference to the freight on the phosphate rock on bringing the appellants before the Court. By a notice of motion dated September 30, 1915, served on the appellants in New York by leave of the Court, the respondents prayed that it should be pronounced that they were entitled to remuneration for carriage of the goods and that the amount should be referred to the registrar and merchants.

The motion was heard by the President (Sir Samuel Evans) on November 22, 1915. He held that the claim came within the principles laid down in his decision in *The Corsican Prince* (1), and that the claim to freight was a matter incident to the seizure of the phosphate; he further held that the claim before the Prize Court was not res judicata because it was a different claim from that adjudicated upon by the King's Bench Division and was made to a Court having a different jurisdiction. The Court pronounced that the respondents were entitled to claim for remuneration in respect of the transportation of 2550 tons of phosphate rock in the *St. Helena* and referred the claim to the registrar and merchants to report thereon. The judgment is reported at 1 Br. & Col. P. C. 618. Leave to appeal was granted.

1916. July 12. *Roche*, *K.C.*, and *R. A. Wright*, for the appellants. The Prize Court had no jurisdiction to entertain the claim. It did not arise out the seizure, since the voyage had been abandoned

(1) [1915] P. 195.

before the seizure took place. The Marshal had released the goods to the appellants on the terms that questions of freight should be dealt with as between ship and consignee. The case is therefore distinguishable from *The Corsican Prince* (1) and *The Iolo.* (2) In the former of those cases the goods had been released upon terms which placed the owners in the position of the captors. In the latter case the Marshal had paid part of the freight and had undertaken to pay the balance. The Prize Court cannot make an order for the payment of freight where neither the goods nor their proceeds are under the control of the Court: *The Fortuna.* (3)

But if there was jurisdiction there should have been no reference to the registrar and merchants as no claim to freight or compensation in lieu of freight was open to the respondents. The completion of the voyage had become unlawful and had been abandoned by the ship prior to the seizure. Where goods have not been carried to their destination compensation in lieu of freight is allowed only when the failure to complete the contract arises from an incapacity in the goods: *The Diana* (4); *The Fortuna* (5); *The Copenhagen.* (6) The decision in *The Friends* (7) is consistent with this principle, it being there held that both ship and cargo suffered from a common misfortune. So too in *The Juno* (8) the goods were consigned to Amsterdam, but were seized in England and condemned.

Inskip, K.C., and *Raeburn*, for the respondents. The Prize Court had jurisdiction, since the claim was incident to the seizure; the subsequent release of the goods did not terminate the jurisdiction which arose upon that seizure: *Le Caux* v. *Eden* (9); *Smart* v. *Wolff.* (10) Even if goods are released because they were wrongly seized, the jurisdiction is not terminated: *The Corsican Prince* (1); *The Iolo.* (2) The last two cases are not distinguishable from the present. The Prize Court could effectively exercise its jurisdiction, since the deposited freight was held, as the goods were, to the

(1) [1916] P. 195.
(2) [1916] P. 206.
(3) (1802) 4 C. Rob. 278; 1 Eng. P. C. 392.
(4) (1803) 5 C. Rob. 67; 1 Eng. P. C. 424.
(5) (1809) Edw. 56; 2 Eng. P. C. 17.
(6) (1799) 1 C. Rob. 289; 1 Eng. P. C. 138.
(7) (1810) Edw. 246; 2 Eng. P. C. 48.
(8) [1916] P. 169.
(9) (1781) 2 Doug. 594 604.
(10) (1789) 3 T. R. 323, 341.

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Marshal's order. The order was properly made. *The Diana* (1) and the other cases referred to deal with the position of captors. There is no case in which the same principle has been applied by the Prize Court between shipowner and cargo owner. It does not follow from the release of the cargo that it was not enemy cargo. The decision in *The Friends* (2) supports the respondents' claim.

Roche, K.C., replied.

Aug. 1. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. The jurisdiction of the Prize Court attaches in every case in which there has been a seizure in prize, and in exercising this jurisdiction the Court can and will deal with all incidental matters, including questions of freight or compensation in lieu of freight. In the present case the goods in question were seized as prize on August 12, 1914. The jurisdiction of the Court having thus attached, the onus of proving its determination must rest on those who allege it. The appellants have not, in their Lordships' opinion, discharged this onus. Though it is possible that the release of a vessel or goods seized as prize in the manner prescribed by the Prize Court Rules (Order XIII.) may determine the jurisdiction of the Court, their Lordships do not consider that the mere handing over of the vessel or goods to the persons who claim to be entitled without any compliance with the prescribed formalities can have this effect. The real question, therefore, is whether the circumstances of this case justified the order under appeal.

When the present war broke out on August 4, 1914, the British steamship *St. Helena* was on a voyage from Tampa and Galveston to Bremen and Hamburg with a cargo consisting (inter alia) of phosphate rock deliverable under bills of lading at Hamburg to the order of the appellants, an American company. She arrived at the Lizard on August 7 and, having been informed of the outbreak of war, abandoned her voyage, which had become unlawful, and proceeded to Manchester. She arrived at Manchester on August 10 and there discharged part of her cargo, consisting of cotton and grain. On August 12 the phosphate rock, being still on board, was seized as prize and came into the possession of the Prize Court Marshal. It had been shipped by the appellants in order to be delivered to

(1) 5 C. Rob. 67. (2) Edw. 246.

two German companies under certain contracts c.i.f. at Hamburg and was thought to be enemy property. The ship was subsequently removed to Runcorn, where the phosphate rock was discharged into the custody of the Manchester Ship Canal Company on account of the Marshal. On September 8, 1914, the Marshal's substitute, being satisfied that the property in the phosphate rock still remained in the appellants, wrote to the appellants' solicitors that he was authorized to release the same without presentation of documents or payment of freight, and that all transactions as regarded bills of lading and freight were to be dealt with as between ship and consignee. He also wrote to the same effect to the canal company, who delivered the phosphate rock to the appellants against deposit, in the usual way, of the amount claimed by the ship for freight. The respondents, the shipowners, subsequently instituted an action in the King's Bench Division to enforce their claim to freight, but this action was dismissed with costs on the ground that the respondents, not having carried the goods to Hamburg in accordance with their contract, could not recover the agreed freight or any part thereof. The respondents thereupon applied by motion to the Prize Court asking for a declaration that they were entitled to some remuneration for the carriage of the appellants' goods, and a reference to the registrar and merchants to ascertain the amount. On the hearing of this motion the President made an order declaring that the respondents were entitled to claim for remuneration in respect of the carriage of the goods and referring such claim to the registrar and merchants for report. Some discussion took place before their Lordships as to the precise meaning of this order. In their Lordships' opinion it cannot be regarded merely as affirming the jurisdiction of the Court to entertain the application, leaving the question whether the application should be granted for subsequent determination after report by the registrar and merchants. In effect it allows the application, the reference to the registrar and merchants being for the purpose of ascertaining the amount only. The question their Lordships have to decide is whether the order so construed was rightly made.

In their Lordships' opinion it is quite clear that as a matter of contract no freight was payable. Under the contract between the parties nothing could become due for freight until the ship had

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performed her part of the bargain by carrying the goods to their port of destination. In order to succeed, therefore, the respondents had to establish that, according to the law administered in a Court of Prize, they were entitled to some compensation in lieu of freight. It is pertinent to inquire on what ground they should be entitled to such compensation in the present case. If the goods had never been seized as prize they could have claimed nothing for freight. They abandoned the voyage on August 7, long before the seizure. They could not do otherwise, for the war rendered its continuance unlawful. Why should a subsequent seizure of the goods, unlawful as against the neutral owners, subject such owners to a liability from which they would otherwise have been free, or confer on the shipowners rights which these latter would not otherwise have had ? Their Lordships failed to find any satisfactory answer to these difficulties in the arguments advanced or the cases cited on behalf of the respondents. In their opinion compensation in lieu of freight may well be awarded against the captors where, by reason of a seizure jure belli which turns out to be unlawful, the ship has been deprived of the opportunity of earning freight which but for such seizure it could lawfully have earned. This might, for example, be the case where the ship on which the goods have been carried is a neutral ship, and as such entitled to continue the voyage. Again, it may well be that where enemy goods on board either a neutral or British ship are lawfully seized as prize the ship may be entitled to compensation in lieu of freight. In such a case the captors are the gainers from the fact that the ship has brought the goods to the place of seizure. But where prior to the seizure the voyage has become unlawful, and all possibility of earning the freight has been already lost, there appears to their Lordships to be nothing for which compensation can be properly awarded. It is no part of the function of the Prize Court to alter the contractual relations between shipowner and cargo owner, and this would be the only result of allowing such compensation.

Some stress was laid by the respondents' counsel on the case of *The Friends*. (1) There a British ship bound for the port of Lisbon, a friendly port, found it blockaded by the British Fleet during the temporary occupation of the French. After waiting some days

(1) Edw. 246.

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with the blockading squadron in hopes that the blockade would terminate, she was blown out to sea and captured by a Spaniard. She was almost immediately recaptured by a British ship and taken as prize to Madeira, where both ship and cargo were sold by the captors to pay the salvage. In adjusting the rights of the shipowner and the cargo owners respectively Lord Stowell allowed the ship compensation in lieu of freight. His reason was that both ship and goods had met with a common misfortune, neither being in any way to blame, so that it was fair to divide the loss between them. In the present case there was no common misfortune, the ship was not seized as prize at all, and the seizure of the goods was unlawful. The case of *The Friends* (1) is therefore clearly distinguishable.

In their Lordships' opinion the appeal ought to be allowed with costs here and below, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *William A. Crump & Son.*
Solicitors for respondents: *Lowless & Co.*

[PRIVY COUNCIL.]

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DREWRY AND OTHERS . . . . . APPELLANTS;

AND

DREWRY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Canada (Alberta)—Husband and Wife—Married Women's Relief Act (Alberta, 1910, ch. 18), ss. 2, 8, 10.

The Married Women's Relief Act, 1910 (Alberta), provides as follows:—By s. 2: "The widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the judge before whom the application is made, receive less than if he had died intestate may apply to the Supreme Court for relief." By s. 8: "On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances." By s. 10:

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* *Present:* LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

(1) Edw. 246.

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"Any answer or defence that would have been available to the husband of the applicant in any suit for alimony shall equally be available to his executors or administrators in any application made under this Act."

The respondent without legal justification separated from her husband twenty-four years before he died and lived apart from him during the remainder of his life. After his death she applied to the Court and obtained relief under the above sections :—

Held, that the respondent was precluded by s. 10 from obtaining relief under the Act.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division (March 24, 1916), affirming the judgment of Walsh J.

The respondent was the widow of John Climie Drewry, and the appellants were the executors of the will of the deceased. Under circumstances which appear from their Lordships' judgment the respondent applied to the Supreme Court for relief under the Married Women's Relief Act, 1910 (Alberta), the material sections of which are set out in the head-note. Walsh J., by whom the application was heard, held that, although the respondent would have failed in an alimony suit brought in the lifetime of her husband, she was entitled to relief under the Act. The learned judge thought that the answer or defence available under s. 10 must be one which would have to be substantively pleaded in a suit for alimony, and not merely a proof of facts which established that a suit for alimony could not have been successfully maintained. A contrary view would, he said, lead to the absurd result that if the applicant had lived with her husband in perfect harmony throughout his life, the executors on that ground would have a defence to the application. The learned judge subsequently fixed the amount of the relief at 12,500 dollars, payable on certain terms. Upon appeal the Appellate Division affirmed the judgment, holding that the view of Walsh J. as to the meaning of s. 10 of the Act was correct.

1916. July 21. *Sir R. Finlay, K.C.*, and *Bayford*, for the appellants. Sect. 10 of the Married Women's Relief Act is a complete defence to the respondent's claim, since it was found by the trial judge that the deceased in his lifetime had a good defence to a suit for alimony. The difficulty suggested by the trial judge does not

arise because it is to be implied that the supposed suit for alimony is by a wife living apart from her husband. [Acts of Alberta, 1907, c. 3, s. 16, and (English) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 16 and 17, were referred to.]

M. McDonald, for the respondent. It is well established that a statute should be construed so as to give effect to its general intention: *Bradlaugh* v. *Clarke* (1); *Salmon* v. *Duncombe* (2); and other cases. For the reasons given by the trial judge a strict construction of s. 10 would defeat the remedial object of the Act. The defence available under that section, upon its true construction, is a defence which in an action for alimony would have to be substantively pleaded, such as an agreement, or adultery or cruelty on the part of the applicant. [Sect. 1 of the Consolidated Ordinances of Alberta, 1901, c. 13, was also referred to.]

Sir R. Finlay, K.C., replied.

Aug. 1. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from an order of the Appellate Division of the Supreme Court of Alberta, dated March 24, 1916, which order dismissed an appeal from the judgment of the Supreme Court of Alberta, dated January 17, 1916.

The question in the case depends upon the view which is taken of certain provisions of the Married Women's Relief Act of the province of Alberta.

The late John Climie Drewry, whose executors are the appellants, and the respondent were married on June 6, 1883. They lived together till June 9, 1890. On that day Mrs. Drewry left her husband. She remained separate from him during the remainder of his life. He died on December 28, 1914. It appears from the facts as set out in the judgment of the learned Walsh J. that the wife's separation from and declinature to live with her husband were without legal justification. The separation lasted for over twenty-four years. The wife was possessed of certain means of her own, and made no claim for alimony or otherwise upon her husband during his life. Apart from certain requests by the husband for her return and from certain letters by her to him, the parties led entirely

(1) (1883) 8 App. Cas. 354, 372. (2) (1886) 11 App. Cas. 627, 634.

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separate and independent lives. After the separation he acquired a certain fortune ; and he died leaving a will in which no provision was made for his wife.

By the law of Alberta there is a certain invasion of the unlimited power of testacy. Under the law of Scotland, and of those nations which have followed the principles of the law of Rome, such a limitation is definite, and in certain countries, particularly in Northern Europe, is very large. The limitation has not been adopted by the law of England, and the power of disinherison both of wife and children there remains to a testator. By the law of Alberta a middle course is adopted. As the appellants state in their case, " Prior to the passing of the Married Women's Relief Act a husband could by his will omit to leave any part of his estate to his wife, and she would have no relief whatever. This occasioned some hardship, and relief was thought advisable." Such relief was conferred by the Married Women's Relief Act of Alberta, the material sections of which are these : [Sects. 2, 8, and 10, appearing in the head-note, were set out.]

It is admitted that under the law of Alberta—there being no issue of the marriage—the widow would have succeeded to all the property of her deceased husband had he died intestate. The facts accordingly bring the situation within the scope of s. 2 as one in which the widow " may apply to the Supreme Court for relief," and in which, under s. 8, the Court might make a just and equitable allowance to her, if her claim was not open to and excluded by the answer or defence set forth in s. 10.

It is this last-mentioned section which raises a question of construction not free from difficulty. The Courts below have held that the circumstances are not such as would have permitted alimony to be granted. But they have, notwithstanding this, reached the conclusion that it is open to them to make an allowance under the statute, although s. 10 thereof already stated expressly makes available to the executors any defence which would have been open to the husband in any suit for alimony. It is suggested that, although this result appears to do violence to the language of the Act, that language must be construed according to, and if necessary must give way to, the view entertained as to the intention of the Legislature in passing this statute.

This result is startling, and their Lordships are not prepared to hold that it is justified by law. Their view of the Act is this: The facts as to the situation and relations of the married persons must be taken just as they were. It is to be observed that the defence, which is to be open to the husband's executors, is a defence which would have been open to the husband himself, upon the figurative case that a suit for alimony had been brought against him, but this figurative case involves that the parties had been separated from each other. The difficulty, accordingly, which is raised in the Courts below does not arise, namely, that the defence to a suit for alimony would have been complete if the parties had been living together, and that, accordingly, the innocent and disinherited wife could obtain no allowance from the Court. It is not so; in the case which is thus figured there would have been no defence, because there would have been no suit, and it is a contradiction of ideas to suppose such a suit by the wife or defence by the husband when the facts of the case were that they were living together without any cause of action having arisen. When, however, the parties are separate, and when they have been living independent lives, it is then that the figurative situation has arisen, when a suit may be imagined to have been brought by the wife and the husband may be imagined to have been defending it.

So judged, the present case is clear. Had Mrs. Drewry on the day of or immediately before her husband's death brought a suit against him for alimony, it appears to their Lordships that his defence would have been complete. In this the Board is in entire agreement with the learned judge who tried the case, and who observes: "I would have to dismiss her action for alimony if that was what I was trying." There is no suggestion upon the facts that on the day of or immediately before his death Mrs. Drewry's attitude towards her husband had altered, and it does not, in the view of the Board, appear to be open to the Courts to make an allowance out of the estate of a husband, against whom during his life a wife separated from him and declining to adhere could have obtained no decree of alimony. In the present case it would be, in their Lordships' opinion, a reversal of the express provision of the statute to permit the respondent, after twenty-four years' separation—unjustifiable upon her part—from her husband, to make a claim upon his estate such as could be

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made by a wife living in family with him or having a just right to alimony from him.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgments of the Courts below should be reversed, and that the application should be dismissed; the respondent to pay the costs here and in the Courts below.

Solicitors for appellants: *Gard, Lyell, Betenson & Davidson.*
Solicitors for respondent: *Lawrence Jones & Co.*

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1916, will be as follows:—

In the First Series,
[1916] 1 Ch. [1916] 2 Ch.

In the Second Series,
[1916] 1 K. B. [1916] 2 K. B. [1916] P.

In the Third Series,
[1916] 1 A. C. [1916] 2 A. C.

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ACCEPTANCE OF SERVICE.
See SERVICE OUT OF JURISDICTION.

ACTION - - - - - - - **298, 307**
See ALIEN ENEMY and SERVICE OUT OF JURISDICTION.

AGREEMENT — Confirming Act — Effect of recital - - - - - - - **542**
See CANADA. 4.

ALBERTA.
See CANADA.

ALIEN ENEMY—*Limited Liability Company registered in England—Share Capital held by Alien Enemies—Trading with the Enemy—Right to sue—Authority of Secretary to bring Action on behalf of Company.*

A company was incorporated in England with a capital of 25,000*l.* in 1*l.* shares for the purpose of selling in England tyres made in Germany by a German company, who held the bulk of the shares in the English company. The holders of the remaining shares (save one) and all the directors were Germans resident in Germany. The one share was registered in the name of the secretary, who was born in Germany, but resided in England and had become a naturalized British subject.

After the outbreak of the war between England and Germany an action was commenced in the name of the English company by specially indorsed writ, issued by the company's solicitors on the instructions of the secretary, for payment of a trade debt. In answer to a summons for judgment under Order XIV. the defendants alleged (1.) that the company was an alien enemy company and that payment of the debt would be a trading with the enemy; (2.) that the action was commenced without the authority of the company. The Master gave leave to the plaintiff company to sign final judgment, and his order was affirmed by the judge in chambers and by the Court of Appeal:—

Held, that the action was commenced without authority and ought to be struck out as irregular.

ALIEN ENEMY—*continued.*

Held, further, apart from the question of authority, by Lord Atkinson, Lord Parker of Waddington, Viscount Mersey, Lord Kinnear, and Lord Sumner, that leave to defend the action ought to have been granted, as the circumstances were such as to require investigation in reference to the control and management of the company; by the Earl of Halsbury, that the company was in substance a hostile partnership and was therefore incapable of suing, and that any payment to it would be illegal as a trading with the enemy; by Lord Shaw of Dunfermline and Lord Parmoor, that the company, being registered in England and carrying on business in England, was not an enemy company or a company of an enemy character.

Order of the Court of Appeal [1915] 1 K. B. 893 reversed.

Per Lord Parker of Waddington (with the concurrence of Viscount Mersey, Lord Kinnear, and Lord Sumner):

Semble a company incorporated in the United Kingdom and carrying on business here or in a neutral country by properly authorized agents resident here or in the neutral country is prima facie to be regarded as a friend; but it will assume an enemy character if its agents or the persons de facto in control of its affairs are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies; and any person knowingly dealing with a company in such a case is trading with the enemy. The character of individual shareholders cannot of itself affect the character of the company; but the enemy character of individual shareholders and their conduct may be material on the question whether the company's agents or the persons de facto in control of its affairs are in fact adhering to, taking instructions from, or acting under the control of enemies. A company incorporated in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy. DAIMLER CO. *v.* CONTINENTAL TYRE AND RUBBER CO. (GREAT BRITAIN) - - - **H. L. (E.) 307**

APPEAL—Prize Court - - - - 206
See PRIZE COURT. 1.

APPOINTMENT—Power of - - - 231
See WILL. 1.

AUSTRALIA — NEW SOUTH WALES — *Crown Lands—Improvement Lease—Extension—Reversionary Grant—Voidable—Procedure to avoid—Crown Lands Act*, 1895 (58 *Vict.*, *No.* 18, *N. S. W.*), *ss.* 26, 44.

There is no power under the Crown Lands Act, 1895, of New South Wales, s. 26, to grant to the holder of an improvement lease, granted under that section, an extension of his term from the date of the unexpired term of the existing lease. Sect. 44 of that Act, however, applies to an extension so granted, and it is consequently not void, but voidable; it can only be declared void by the procedure provided by s. 44, and an information for a declaration that it is void cannot be maintained. BULL *v.* ATT.-GEN. FOR NEW SOUTH WALES - - J. C. 564

2. —— **QUEENSLAND** — *Shipping — Compulsory Pilotage—Negligence of Licensed Pilot—Government not liable—Navigation Act*, 1878 (41 *Vict. No.* 3, *Queensland*).

The respondents sued the appellant (representing the Government of Queensland) to recover damages caused to their ship by the negligence of a licensed pilot compulsorily in charge of her under the Navigation Act, 1878, s. 113. Under that statute pilots are licensed and appointed to the ports by the Government and receive salaries paid out of the State revenue, while pilotage rates are paid by the shipowners using the ports to the Government. The licensed pilots are classed as civil servants under the Public Service Act, 1896, and are subject to Government regulations, which, however, do not interfere with the pilots' management of the ships:—

Held, that the action was not maintainable, since the Government owed to the respondents no duty to manage or control their ship, but merely a duty to license and appoint duly qualified pilots, and no failure to perform the latter duty was alleged. FOWLES *v.* EASTERN AND AUSTRALIAN STEAMSHIP CO. - J. C. 556

AUTHORITY—Secretary—Company—Action
See ALIEN ENEMY - - - 307

BRIDGE — *Highway — Railway — Increase of Traffic—Standard of Maintenance—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 46.

Where a public highway is carried over a railway by means of a bridge constructed under the provisions of s. 46 of the Railways Clauses Consolidation Act, 1845, the railway company is liable to maintain the bridge in the condition as to strength in relation to traffic in which it was at the date of completion, but is not liable to improve and strengthen the bridge to make it sufficient to bear the ordinary traffic of the district which may reasonably be expected to pass over it according to the standard of the present day.

So *held* by Lord Buckmaster L.C., Earl Loreburn, Lord Shaw of Dunfermline, and Lord Sumner; Viscount Haldane dissenting.

The principle of *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Att.-Gen.* [1915] A. C. 654 applied.

Decision of the Court of Appeal [1915] W. N. 263 affirmed. ATT.-GEN. *v.* GREAT NORTHERN RY. CO. - - - - - H. L. (E.) 356

CANADA — ALBERTA — *Husband and Wife — Married Women's Relief Act* (*Alberta*, 1910, *ch.* 18), *ss.* 2, 8, 10.

The Married Women's Relief Act, 1910 (Alberta), provides as follows:—By s. 2: "The widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the judge before whom the application is made, receive less than if he had died intestate may apply to the Supreme Court for relief." By s. 8: "On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances." By s. 10: "Any answer or defence that would have been available to the husband of the applicant in any suit for alimony shall equally be available to his executors or administrators in any application made under this Act."

The respondent without legal justification separated from her husband twenty-four years before he died and lived apart from him during the remainder of his life. After his death she applied to the Court and obtained relief under the above sections:—

Held, that the respondent was precluded by s. 10 from obtaining relief under the Act.

DREWRY *v.* DREWRY - - - J. C. 631

2. —— **ONTARIO**—*Legislative Authority—Work declared for General Advantage of Canada—Repeal of Declaring Act — British North America Act*, 1867 (30 *Vict. c.* 3), *s.* 91, *sub-s.* 29, *and s.* 92, *sub-s.* 10 (*c*).

A declaration made by the Parliament of Canada under s. 92, sub-s. 10 (*c*), of the British North America Act, 1867, that a provincial work or undertaking is for the general advantage of Canada, whereby under s. 91, sub-s. 29, of that Act the work or undertaking becomes subject to the exclusive legislative authority of the Dominion, can be repealed or varied by a subsequent Act of that Parliament, and thereupon the work or undertaking ceases to be under Dominion authority, or ceases to be so save to the extent then declared. HAMILTON, GRIMSBY, AND BEAMSVILLE RY. CO. *v.* ATT.-GEN. FOR ONTARIO J. C. 583

3. —— *Municipal Corporation — Construction of Sewer—Interference with Gas Main—"Land"—Injurious Affection—Municipal Act*, 1913 (3 & 4 *Geo.* 5, *c.* 43, *Ontario*), *s.* 321 (*b*); *s.* 325, *sub-s.* 1.

The appellants, in the exercise of their statutory powers, constructed a sewer under a street in Toronto, of which the freehold was vested in them. The construction made it necessary to lower a gas main laid by the respondents under power contained in their Act

CANADA—*continued.*

of incorporation, 11 Vict. c. 14 (Canada). By s. 325, sub-s. 1, of the Municipal Act, 1913 (Ontario), where land is expropriated by a municipal corporation for its purposes, or is injuriously affected by the exercise of its statutory powers, compensation is to be made to the owner. By s. 321 (*b*) of that Act "land" includes a right or interest in, and an easement over, land :—

Held, that the gas main was within the definition of "land" in s. 321 (*b*), and that the appellants were liable for the cost of lowering it as injurious affection under s. 321, sub-s. 1, above mentioned. CORPORATION OF THE CITY OF TORONTO *v.* CONSUMERS' GAS CO. OF TORONTO **J. C. 618**

—— Specific performance.
See SPECIFIC PERFORMANCE.

4. —— *Street Railway—Franchise—Grant in Reversion—Construction of Agreement—Confirming Act—Effect of Recital—Street Railway Act* (*R. S. Ont.*, 1887, *c.* 171), *s.* 18.

The appellants had power under the Street Railway Act (R. S. Ont., 1887, c. 171) to grant to the respondents the privilege of operating street railways in Toronto, but by s. 18 of that Act could not grant the privilege for a longer period than twenty years. By an agreement dated September 1, 1891, the appellants granted to the respondents for twenty years, and for a further period of ten years if enabling legislation were obtained, the exclusive privilege of operating street railways in Toronto except in certain localities, including portions of Yonge Street ; it was further provided that over the said excepted portion of Yonge Street the respondents should have an exclusive right to operate street railways so far as the appellants could legally grant the same. Another company had powers over that street which would expire in 1915, namely, more than twenty but less than thirty years from the date of the agreement. The agreement was scheduled to an Act by which it was confirmed, and which by s. 1 purported to declare its effect :—

Held, that the grant of powers over the excepted portion of Yonge Street was not invalid by reason of being a grant in reversion, and that upon the true construction of the agreement it conferred upon the respondents exclusive running powers thereover upon the powers of the other company terminating in 1915.

Held, further, that the declaration in s. 1 of the confirming Act must be taken as merely explaining and identifying the agreement and not as affecting its construction. CORPORATION OF THE CITY OF TORONTO *v.* TORONTO RY. CO. **J. C. 542**

5. —— **QUEBEC**—*Local Taxation—Exemption of Mining Operations—Assessment on Mining Plant and Machinery.*

A statutory exemption of a mining company from further taxation in respect of its mining operations does not exempt the company from liability to pay a tax subsequently assessed by

CANADA—*continued.*

the township upon the company's immovable property, including mining plant and machinery. THETFORD MINES TOWN CORPORATION *v.* AMALGAMATED ASBESTOS CORPORATION, LD. **J. C. 588**

6. —— **SASKATCHEWAN**—*Provincial Taxation—Assessment—Dominion Lands—Interest of Lessee—Validity—British North America Act*, 1867 (30 *Vict. c.* 3), *s.* 125.

By the British North America Act, 1867, s. 125, "no lands or property belonging to Canada or any province shall be liable to taxation."

The appellant was assessed under Saskatchewan statutes, 6 Edw. 7, c. 36, and 7 Edw. 7, c. 3, and their amendments, in respect of Dominion land of which he held grazing leases from the Crown. Land is defined for the purpose of those statutes as including any estate or interest therein :—

Held, that the statutes could be read as imposing the tax upon the appellant's interest in the land, and should be so read in order to make them consistent with s. 125 above mentioned, and not a nullity. SMITH *v.* COUNCIL OF THE RURAL MUNICIPALITY OF VERMILLION HILLS. ATTS.-GEN. FOR CANADA AND FOR SASKATCHEWAN, INTERVENANTS - **J. C. 569**

CASES :—

—— *Allen* (*David*) *and Sons, Billposting, Ld.* v. *King* [1915] 2 I. R. 448.
Affirmed - - - **H. L. (I.) 54**

—— *Att.-Gen.* v. *Derbyshire C. C.* [1916] 1 Ch. 177.
Affirmed - - - **H. L. (E.) 283**

—— *Att.-Gen.* v. *Foran* - - [1915] 1 Ch. 703
Affirmed - - - **H. L. (E.) 128**

—— *Att.-Gen.* v. *Great Northern Ry. Co.* [1915] W. N. 263.
Affirmed - - - **H. L. (E.) 356**

—— *Ayre* v. *Craven* - (1834) 2 Ad. & E. 2
Applied. JONES *v.* JONES
H. L. (E.) 481

—— *Boord and Son* (*Incorporated*) v. *Bagots, Hutton & Co.* [1916] 2 Ch. 103.
Affirmed - - - **H. L. (E.) 382**

—— *Chile, The* - - - [1914] P. 217
Order in, applied. THE GUTENFELS
J. C. 112

—— *Considine* v. *McInerney* [1916] 2 I. R. 193
Reversed - - - **H. L. (I.) 162**

—— *Daimler Co.* v. *Continental Tyre and Rubber Co.* (*Great Britain*) [1915] 1 K. B. 893.
Reversed - - - **H. L. (E.) 307**

—— *Dixon, In re* - - - [1902] 1 Ch. 248
Overruled. O'GRADY *v.* WILMOT
H. L. (E.) 231

—— *Dodson, In re* - - [1907] 1 Ch. 284
Followed. O'GRADY *v.* WILMOT
H. L. (E.) 231

CASES—*continued.*

—— *Dyson* v. *Att.-Gen.* - [1912] 1 Ch. 158
Principle of, applied. ATT.-GEN. *v.* FORAN - - **H. L. (E.) 128, 149**

—— *Evans* v. *Edinburgh Corporation*, 1915 S. C. 895.
Affirmed - - - **H. L. (Sc.) 45**

—— *Fearnsides, In re* - [1903] 1 Ch. 250
Overruled. O'GRADY *v.* WILMOT **H. L. (E.) 231**

—— *Foster* v. *Barnard* - [1916] 1 K. B. 632
Affirmed - - - **H. L. (E.) 154**

—— *Fox, The* (1811) Edw. 312.
Dictum of Lord Stowell in, disapproved. THE ZAMORA - - - **J. C. 77**

—— *Greenlands, Ld.* v. *Wilmshurst and London Association for Protection of Trade* [1913] 3 K. B. 507.
Reversed - - - - **H. L. (E.) 15**

—— *Grimthorpe (Lord), In re* - [1908] 2 Ch. 675
Distinguished. O'GRADY *v.* WILMOT **H. L. (E.) 231**

—— *Hadley, In re* - - [1909] 1 Ch. 20
Overruled. O'GRADY *v.* WILMOT **H. L. (E.) 231**

—— *Hooley* v. *Butterley Co.* (1915) 84 L. J. (K.B.) 1969.
Reversed - - - - **H. L. (E.) 63**

—— *Hulthen* v. *Stewart & Co.* [1903] A. C. 389
Principle of, applied. LOVE AND STEWART, LD. *v.* ROWTOR STEAMSHIP CO. - - - - **H. L. (Sc.) 527**

—— *Jones* v. *Jones* - - [1916] 1 K. B. 351
Affirmed - - - **H. L. (E.) 481**

—— *London Corporation v. Netherlands Steamboat Co.* [1906] A. C. 263.
Followed. ASSOCIATED NEWSPAPERS, LD. *v.* LONDON (CITY) CORPORATION **H. L. (E.) 429**

—— *Love and Stewart, Ld.* v. *Rowtor Steamship Co.* 1916 S. C. 223.
Reversed - - - **H. L. (Sc.) 527**

—— *Lumby* v. *Allday* (1831) 1 Cr. & J. 301, 305.
Dictum of Bayley B. in, explained. JONES *v.* JONES - **H. L. (E.) 481**

—— *Macintosh* v. *Dun* - - [1908] A. C. 390
Distinguished. LONDON ASSOCIATION FOR PROTECTION OF TRADE *v.* GREENLANDS, LD. - - **H. L. (E.) 15**

—— *Maddock, In re* - - [1901] 2 Ch. 372
Followed. O'GRADY *v.* WILMOT **H. L. (E.) 231**

—— *Manley* v. *St. Helens Canal and Ry. Co.* (1858) 2 H. & N. 840.
Distinguished. GREAT CENTRAL RY. CO. *v.* HEWLETT - **H. L. (E.) 511**

—— *Moore, In re* - - - [1901] 1 Ch. 691
Overruled. O'GRADY *v.* WILMOT **H. L. (E.) 231**

CASES—*continued.*

—— *Moore* v. *Lambeth Waterworks Co.* (1886) 17 Q. B. D. 462.
Applied. GREAT CENTRAL RY. CO. *v.* HEWLETT - - **H. L. (E.) 511**

—— *O'Grady* v. *Wilmot* - [1915] 1 Ch. 613
Reversed - - - **H. L. (E.) 231**

—— *Ophelia, The* - - - [1915] P. 129
Affirmed - - - - **J. C. 206**

—— *Orlebar, In re* - - [1908] 1 Ch. 136
Overruled. O'GRADY *v.* WILMOT **H. L. (E.) 231**

—— *Perchard* v. *Heywood* - (1800) 8 T. R. 468
Explained. ASSOCIATED NEWSPAPERS, LD. *v.* LONDON (CITY) CORPORATION **H. L. (E.) 429**

—— *Postlethwaite* v. *Freeland* (1880) 5 App. Cas. 599.
Principle of, applied. LOVE AND STEWART, LD. *v.* ROWTOR STEAMSHIP CO. - - - - **H. L. (Sc.) 527**

—— *Power, In re* - - - [1901] 2 Ch. 659
Followed. O'GRADY *v.* WILMOT **H. L. (E.) 231**

—— *Rex* v. *London Gas Light and Coke Co.* (1828) 8 B. & C. 54.
Explained. Dictum of Bayley J. in, at p. 62, overruled. ASSOCIATED NEWSPAPERS, LD. *v.* LONDON (CITY) CORPORATION - - **H. L. (E.) 429**

—— *Richards* v. *Wrexham and Acton Collieries* [1914] 2 K. B. 497.
Overruled. HOOLEY *v.* BUTTERLEY CO. - - - - - **H. L. (E.) 63**

—— *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Att.-Gen.* [1915] A. C. 654.
Principle of, applied. ATT.-GEN. *v.* GREAT NORTHERN RY. CO. **H. L. (E.) 356**

—— *Sion College* v. *London Corporation* [1901] 1 K. B. 617.
Overruled in part. ASSOCIATED NEWSPAPERS, LD. *v.* LONDON (CITY) CORPORATION - - **H. L. (E.) 429**

—— *Tamplin (F. A.) Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* [1916] 1 K. B. 485.
Affirmed - - - **H. L. (E.) 397**

—— *Treasure, In re* - - [1900] 2 Ch. 648
Followed on one point and overruled on one point. O'GRADY *v.* WILMOT **H. L. (E.) 231**

—— *Welsh* v. *Glasgow Coal Co.*, 1915 S. C. 1020
Affirmed - - - **H. L. (Sc.) 1**

—— *Williams* v. *Pritchard* (1790) 4 T. R. 2
Explained. ASSOCIATED NEWSPAPERS, LD. *v.* LONDON (CITY) CORPORATION - - **H. L. (E.) 429**

—— *Zamora, The* - - - [1916] P. 27
Reversed - - - - **J. C. 77**

—— *Ziman* v. *Komata Reefs Gold Mining Co.* [1915] 2 K. B. 163.
Approved. FOSTER *v.* BARNARD **H. L. (E.) 154**

"CAT" MARK FOR GIN.
See TRADE MARK.

CEYLON—*Husband and Wife—Separation Deed—Annuity payable to Wife—Divorce—Roman-Dutch Law—Ceylon Ordinance* 15 *of* 1876.

A husband and wife, domiciled in Ceylon but living apart, entered into a deed of separation which provided that the husband should pay the wife an annuity by monthly instalments. The right to the annuity was not to be affected by a dissolution of the marriage by reason of the misconduct of either party. The marriage was subsequently dissolved owing to the husband's misconduct. The wife sued to recover an instalment of the annuity payable after the dissolution :—

Held, that, with regard to the matrimonial rights of persons domiciled in Ceylon, Ordinance 15 of 1876, except in the case of an ambiguity, excludes considerations of Roman-Dutch law ; that the agreement for an annuity was valid under s. 13 of that Ordinance, and the instalment recoverable. JAMES DE SOYSA *v.* MARIA DE SOYSA - - - - **J. C. 593**

CHARTERPARTY.
See SHIPPING.

COMPANY — Alien enemy — Limited liability company registered in England—Share capital held by alien enemies—Trading with the enemy—Right to sue—Authority of secretary to bring action on behalf of company - - - **307**
See ALIEN ENEMY.

—— Secretary—Authority to bring action **307**
See ALIEN ENEMY.

COMPENSATION.
See WORKMEN'S COMPENSATION.

COMPULSORY PILOTAGE - - - **556**
See AUSTRALIA. 2.

CONCURRENT WRIT, SERVICE OF.
See SERVICE OUT OF JURISDICTION.

CONFIRMING ACT—Agreement - - **542**
See CANADA. 4.

CONTRABAND - - - - - - - **77**
See PRIZE COURT. 9.

CONTRACT—Invalidity—Approval by House of Assembly—Governor in Council - **610**
See NEWFOUNDLAND.

—— Time of the essence - - - - **599**
See SPECIFIC PERFORMANCE.

COUNCIL, KING IN - - - - **77**
See PRIZE COURT. 9.

—— Governor in - - - - - **610**
See NEWFOUNDLAND.

COUNCIL, ORDERS IN - - - - **77**
See PRIZE COURT. 9.

COUNTY COUNCIL.
See LOCAL GOVERNMENT.

CROWN—Reversion.
See AUSTRALIA and IRELAND.

—— Royal prerogative—Orders in Council **77**
See PRIZE COURT. 9.

CROWN LANDS — Improvement lease — Extension—Reversionary grant. - **564**
See AUSTRALIA. 1.

CUSTOM OF PORT - - - - - **527**
See SHIPPING. 1.

CUSTOMARY STEAMSHIP DESPATCH - **527**
See SHIPPING. 1.

DEFAMATION—*Libel—Privileged Occasion—Association of Traders for Mutual Protection—Communication to Members.*

An unincorporated body called the London Association for Protection of Trade, now comprising over 6000 members, was formed for the purpose (inter alia) of making inquiries as to the commercial standing and credit of traders. No qualification for membership was required beyond the payment of an annual subscription, which entitled each member to a certain number of inquiries free and to a further number for an additional payment, but subject to a condition in every case against divulging the information so acquired. The association did not trade for profit.

A member of the association applied for information as to the commercial credit of a trading company with whom he proposed to deal. The secretary of the association having applied to W. for the information, W. made a report, for which he was paid a small fee, containing untrue and defamatory statements of the company. The secretary sent a report in substantially the same terms to the member. In respect of the secretary's report the company brought an action for libel against W., the association, and the secretary. The jury returned a verdict of 750*l.* against W., against whom they found express malice, and of 1000*l.* against the association and the secretary, and judgment was entered accordingly. An application to the Court of Appeal by the two latter defendants for judgment on the ground that the report was published on a privileged occasion was refused. In the House of Lords the plaintiff company consented to the judgment obtained by them against the association being set aside :—

Held, Earl Loreburn doubting but not formally dissenting, that the secretary in making the inquiry and the report was acting, not as the agent of the association as a whole, but as the confidential agent of the particular member, and that the publication was therefore made on a privileged occasion.

Macintosh v. *Dun* [1908] A. C. 390 distinguished.

Decision of the Court of Appeal [1913] 3 K. B. 507 reversed. LONDON ASSOCIATION FOR PROTECTION OF TRADE *v.* GREENLANDS, LD.
H. L. (E.) 15

DEFAMATION—*continued.*

2. —— *Slander — Cause of Action—Words imputing Moral Misconduct—Schoolmaster — Absence of Special Damage—Words not spoken of Plaintiff in Relation to his Calling.*

An action of slander will not lie for words imputing adultery to a schoolmaster, in the absence of proof of special damage, unless the words are spoken of him touching or in the way of his calling.

Ayre v. *Craven* (1834) 2 Ad. & E. 2 applied.

Dictum of Bayley B. in *Lumby* v. *Allday* (1831) 1 Cr. & J. 301, 305, explained.

Decision of the Court of Appeal [1916] 1 K. B. 351 affirmed. JONES *v.* JONES **H. L. (E.) 481**

DEFENDANTS DOMICILED IN SCOTLAND—Service out of jurisdiction - - **298**
See SERVICE OUT OF JURISDICTION.

DEMURRAGE - - - - - - - **527**
See SHIPPING. 1.

DESPATCH MONEY - - - - - **527**
See SHIPPING. 1.

DEVICE—Similarity of.
See TRADE MARK.

EGYPT—H. B. M. Supreme Court for—Appeal from - - - - - - - **112**
See PRIZE COURT. 6.

EMERGENCY LEGISLATION—*Stock Exchange —Stockbroker and Client—Purchase of Shares—Resale at a Loss—Power of Unpaid Stockbroker to resell without the Leave of the Court—Courts (Emergency Powers) Act*, 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1, *sub-s.* 1 (*b*).

The Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1, provides that from and after the passing of the Act no person shall—(*b*) (inter alia) take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, or "realise any security (except by way of sale by a mortgagee in possession)" for the purpose of enforcing the payment or recovery of any sum of money to which the sub-section applies, or in default of the payment or recovery of any such sum of money, except after an application to the Court.

In July, 1914, a stockbroker on the London Stock Exchange bought from a jobber certain shares on the instructions of a client. After the passing of the Courts (Emergency Powers) Act the stockbroker paid the jobber for the shares, but as his client declined to take delivery and pay for them at the settlement, he sold them at a loss and sued the client for the difference between the money paid for them and the amount which they realized at the resale:—

Held, assuming without deciding that the shares were a "security" within s. 1, sub-s. 1 (*b*), of the Act, that the broker was at the time he realized "a mortgagee in possession" and was therefore entitled to realize the security without first obtaining the leave of the Court.

EMERGENCY LEGISLATION—*continued.*

Ziman v. *Komata Reefs Gold Mining Co.* [1915] 2 K. B. 163 approved.

Decision of the Court of Appeal [1916] 1 K. B. 632 affirmed. FOSTER *v.* BARNARD **H. L. (E.) 154**

ENEMY—Alien.
See ALIEN ENEMY.

—— Ship.
See PRIZE COURT.

ESSENCE—Time.
See SPECIFIC PERFORMANCE.

ESTATE DUTY—Incidence—Personal property —Exercise by will of general power of appointment—"Property which does not pass to the executor as such"—Real estate settled on trust for sale **231**
See WILL. 1.

ESTOPPEL - - - - - - - **527**
See SHIPPING. 1.

EVIDENCE—*Infancy—Date of Birth—Family Record—Admissibility—Illustrations to Statute —Straits Settlements Ordinance III. of* 1893, *s.* 32, *sub-s.* 5, *and Illustration* (*l*).

In an action in the Straits Settlements to recover the amount due upon certain mortgages the defendant pleaded that he was an infant when he executed them. As evidence in support of this plea there was tendered at the trial an entry recording the date of the defendant's birth made by the defendant's deceased father in a book in which he made similar entries with regard to his family:—

Held, that under the Straits Settlements Evidence Ordinance, 1893, s. 32, sub-s. 5, and having regard to illustration (*l*) to that section, the entry was admissible in evidence.

Illustrations appended to sections of a statute should be accepted, if that can be done, as being of relevance and value in construing the text; they should only be rejected as repugnant to the section as the last resort of construction. MAHOMED SYEDOL ARIFFIN *v.* YEOH OOI GARK **J. C. 575**

EXECUTOR—Property passing to - - **231**
See WILL. 1.

EXECUTORY GIFT—Vesting—Period of distribution—Defeasance - - - **121**
See WILL. 2.

EXEMPTION—Local taxation.
See CANADA and RATES.

FAMILY RECORD.
See EVIDENCE.

FINANCE ACTS - - - - **128, 231**
See REVENUE and WILL. 1.

"FORCE MAJEURE" - - - - **199**
See PRIZE COURT. 4.

FREIGHT - - - - - - - **625**
See PRIZE COURT. 8.

GAS MAIN — Interference with — Municipal corporation—Construction of sewer **618**
See CANADA. 3.

GIN—"Cat" mark for.
See TRADE MARK.

GOVERNOR IN COUNCIL — Contract — Invalidity — Approval by House of Assembly - - - - - - **610**
See NEWFOUNDLAND.

HAGUE CONVENTION OF 1907, Convention VI., Arts. 1 and 2:
THE BELGIA - - - **J. C. 183**
THE CONCADORO - - - **J. C. 199**
THE GUTENFELS - - - **J. C. 112**
THE MARQUIS BACQUEHEM **J. C. 186**
—— —— **Convention X., Arts. 1 and 8:**
THE OPHELIA - - - **J. C. 206**

HIGHWAY.
See BRIDGE and NEGLIGENCE.

HOSPITAL (ISOLATION) COMMITTEE.
See LOCAL GOVERNMENT.

HOSPITAL SHIP - - - - - **206**
See PRIZE COURT. 1.

INCREMENT VALUE DUTY - - - **128**
See REVENUE.

INFANCY.
See EVIDENCE.

INFRINGEMENT.
See PATENT.

INJURIOUS AFFECTION — Gas main — Construction of sewer—Land - - **618**
See CANADA. 3.

IRELAND—*Land Purchase Acts—Sale of Land—Superior Interest—Redemption—Crown Reversion expectant on Determination of an Estate in Tail Male—Jurisdiction of the Irish Land Commissian to fix Price of Redemption without the Consent of the Crown—Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 31—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 98, *sub-s.* 2.
Land in which the Crown was entitled to a reversion expectant on the determination of an estate in tail male was sold under the provisions of the Irish Land Purchase Acts in the Court of the Irish Land Commission:—
Held, upon the construction of s. 31 of the Land Law (Ireland) Act, 1896, as amended by s. 98, sub-s. 2, of the Irish Land Act, 1903, that the Land Commission had jurisdiction to determine, without the consent of the Commissioners of Woods and Forests, the price (if any) to be paid for the redemption of the Crown reversion.
Decision of the Court of Appeal in Ireland affirmed. ATT.-GEN. FOR IRELAND *v.* PROBY **H. L. (I.) 468**

ISOLATION HOSPITAL—Hospital committee—Control by county council—Power of council to vary representation of constituent local authorities. - - **283**
See LOCAL GOVERNMENT.

JAMAICA—Appeal from - - - - **121**
See WILL. 2.

JURISDICTION—Prize Court - - **203, 625**
See PRIZE COURT. 8, 10.

—— Service out of.
See SERVICE OUT OF JURISDICTION.

KING IN COUNCIL—Powers - - - **77**
See PRIZE COURT. 9.

"LAND" — Injurious affection — Gas main — Lowering - - - - - **618**
See CANADA. 3.

LAND PURCHASE ACTS (IRELAND).
See IRELAND.

LAND VALUES - - - - - - **128**
See REVENUE.

LEGISLATIVE AUTHORITY. - - **77, 583**
See CANADA, 2, and PRIZE COURT, 9.

LIBEL - - - - - - - - **15**
See DEFAMATION. 1.

LICENCE—*Revocation—Assignment of Premises to which Licence was attached—Refusal of Assignee to continue Licence—Interest in Land—Licensee's Right of Action against Licensor.*
By an agreement in writing dated in July, 1913, and made between the defendant, therein described as "the licensor," and the plaintiffs, therein described as "the licensees," the defendant gave the plaintiffs permission to affix posters and advertisements to the flank walls of a picture house proposed to be erected on his property by a company about to be formed, for a period of four years from November 1, 1913, or the first day the picture house should be opened for business, at a rent of 12*l.* per annum, and the defendant agreed that he would not, while the licence remained in force, permit any other person to affix any advertisement to the said walls, and would, if required by the plaintiffs, take proceedings against any person affixing advertisements thereto. By an agreement for a lease of the site dated in August, 1913, and made between the defendant and a trustee for the picture house company, the defendant agreed to assign to the trustee all his interest in the agreement of July, and the trustee agreed to obtain the ratification by the company when formed of that agreement. The company was incorporated in September, 1913, and shortly afterwards the agreement of August was ratified and the lease from the defendant to the company was executed. The lease contained no reference to the agreement of July. The company having refused the permission granted by that agreement, the licensees brought an action for damages for breach of the agreement against the licensor:—
Held, that the agreement did not create an interest in land, but created merely a personal obligation on the part of the licensor to allow the licensees the use of the wall for advertisements, and that as he had put it out of his

LICENCE—*continued.*

power to fulfil his obligation under the agreement, he was liable in damages for breach of contract.

Decision of the Court of Appeal in Ireland [1915] 2 I. R. 448 affirmed. KING *v.* DAVID ALLEN AND SONS, BILLPOSTING, LD.

H. L. (I.) 54

LICENSED PILOT—Negligence - - 556
See AUSTRALIA. 2.

LOCAL GOVERNMENT—*Isolation Hospital—Hospital Committee—Control by County Council—Power of Council to vary Representation of Constituent Local Authorities—Isolation Hospitals Act*, 1893 (56 & 57 *Vict. c.* 68), *ss.* 9, 10, 20—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 32, *sub-s.* 3.

By an order made in 1897 by a county council under the Isolation Hospitals Act, 1893, several districts in the county were formed into a joint hospital district for the provision and maintenance of an isolation hospital for the reception of patients suffering from infectious diseases in the constituent districts, and a hospital committee was constituted consisting of fifteen members, of whom two were to be elected by the county council and thirteen by the authorities of the constituent districts. The hospital committee provided a small-pox hospital to which the county council contributed. Differences having arisen between the county council and the hospital committee as to the adequacy of the hospital accommodation, in 1914 the county council, purporting to act under the powers of s. 32 of the Interpretation Act, 1889, and of the Isolation Hospitals Act, 1893, made a further order which rescinded the regulations of the order of 1897 relating to the constitution of the hospital committee, and provided that the committee should consist of fifteen members, of whom six were to be elected by the authorities of the constituent districts and nine by the county council. One of the local authorities objected that this order was ultra vires :—

Held, upon the construction of the Isolation Hospitals Act, 1893, that the constitution of the hospital committee was wholly in the discretion of the county council, provided it contributed to the funds of the hospital, subject only to a right of appeal to the Local Government Board; that s. 32, sub-s. 3, of the Interpretation Act, 1889, empowered the county council to rescind the regulations of the order of 1897; and that in making the order of 1914 they had acted within their statutory powers.

Decision of the Court of Appeal [1916] 1 Ch. 177 affirmed. ATT.-GEN. *v.* DERBYSHIRE C. C. - - - - - - **H. L. (E.) 283**

MAINTENANCE—Bridge—Highway—Railway
See BRIDGE. 356

MILITARY HOSPITAL SHIP - - 206
See PRIZE COURT. 1.

MINERALS—Land values - - - 128
See REVENUE.

MINES—*Minimum Wage*—"*Employer*"—*Stallman and Holer—Butty System—Liability of Colliery Company to Holer—Coal Mines* (*Minimum Wage*) *Act*, 1912 (2 *Geo.* 5, *c.* 2), *s.* 1, *sub-s.* 1.

The plaintiff, who was employed underground as a holer by a colliery company, on entering the service of the company signed an agreement whereby he agreed to serve the company on the terms of certain contract rules and empowered the company to make certain specified deductions from wages. By rule 2 of the contract rules coal was to be paid for by weight, and by rule 3, "All persons working under or for stallmen or contractors shall be deemed to be servants of the company to the extent only that they shall be bound to obey these contract rules and the other rules and regulations of the colliery." The colliery was worked on the butty system. Weekly pay checks were made out to the number of the stall showing the net total amount earned in the stall calculated upon a tonnage rate in accordance with the coal gotten, and the money was received by the stallman or buttyman, who handed to the holers and fillers employed in the stall wages regulated by the work done by each in accordance with the recognized rates of wages for the colliery and kept the balance for himself. Owing to hard holing the wages received from the stallman by the plaintiff, who was usually paid by piece work, were during a period of four months less than the minimum wage to which he was entitled under the Coal Mines (Minimum Wage) Act, 1912. In answer to an action in the county court by the plaintiff against the company for payment of the balance required to make up the minimum wage the company maintained, first, that they were not the employers of the plaintiff within the meaning of the Act, and, secondly, that their liability was absolved by payment to the stall of an aggregate amount sufficient to provide a minimum wage all round. The county court judge gave judgment for the plaintiff :—

Held—(1.) that there was an employment of the plaintiff by the company at wages, and that rule 3 did not apply to a person who was under an independent contract of service already the servant of the company; (2.) (by Earl Loreburn, Viscount Haldane, and Lord Atkinson, Lord Buckmaster L.C. expressing no concluded opinion on the point), overruling *Richards* v. *Wrexham and Acton Collieries* [1914] 2 K. B. 497 on this point, that for the purposes of s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, it was not necessary that the employer should be also the paymaster of the employee; (3.) that payment by the company to the stall of a sum sufficient to provide a minimum wage to each of the workmen under a different method of distribution was not a discharge of their obligation under the Act.

Decision of the Court of Appeal (84 L. J. (K.B.) 1969) reversed. HOOLEY *v.* BUTTERLEY Co. - - - - - - - **H. L. (E.) 63**

MINIMUM WAGE—"Employer"—Stallman and holer—Butty system—Liability of colliery company to holer - - 63
See MINES.

MORTGAGE—Undischarged.
See SPECIFIC PERFORMANCE.

MORTGAGEE IN POSSESSION - - 154
See EMERGENCY LEGISLATION.

NEGLIGENCE—*Highway—Obstruction—Door opening outwards across Pavement—Injury to Foot Passenger—Action of Damages—Liability of Owner of Door—Liability of Road Authority—Roads and Bridges (Scotland) Act*, 1878 (41 & 42 *Vict. c.* 51), *ss.* 3, 94, 123; *Sched. C., s.* 105—*Edinburgh Municipal and Police Act*, 1879 (42 & 43 *Vict. c. cxxxii.*), *s.* 151.

In an action of damages against the corporation of Edinburgh and against the owners of a tenement in the city, the pursuer averred that while he was proceeding along a street which adjoined the garden wall of the tenement a door in the wall suddenly opened outwards on to the street and struck him on the face, causing him serious injuries; that the door as constructed formed an obstruction to the street; and that it constituted a grave danger to the public, and a danger which was obvious to the defenders. He averred fault against the owners for having on their premises a door of this dangerous construction; and he averred fault against the corporation in failing to remove this dangerous obstruction to the street, which he alleged they had power to do under the Roads and Bridges (Scotland) Act, 1878, ss. 3, 94, 123, and Sched. C., s. 105, and the Edinburgh Municipal and Police Act, 1879, s. 151:—

Held, that the pursuer had not stated a relevant case against the owners, because having a door opening outwards upon a street did not per se infer negligence on their part, nor against the corporation, for (1.) the door was not an obstruction to the highway within s. 151 of the Edinburgh Municipal and Police Act, 1879, which the corporation had power to remove, and (2.) the pursuer had failed to aver that the street in question was a street to which the provisions of the Roads and Bridges (Scotland) Act, 1878, applied.

Decision of the First Division of the Court of Session in Scotland, 1915 S. C. 895, affirmed.
EVANS *v.* EDINBURGH CORPORATION
H. L. (Sc.) 45

2. —— *Highway—Obstruction—Legalization by Statute—Reduction of Lighting Regulations—Accident—Great Central Railway Act*, 1902 (2 *Edw.* 7, *c. cxxxv.*), *s.* 31.

A railway company, for the more convenient management of their station, erected in the public highway certain gate posts from which collapsible steel gates could be run across the road so as to close the entrance to the station yard. These posts were erected by the company in contravention of their special Act, and in 1901 were judicially held to be an obstruction to the highway. In 1902 the company obtained an Act which empowered them to "maintain" the posts and gates and to replace them, when necessary, on the same site.

A licensed taxicab driver, while lawfully driving his cab on a dark rainy night along the public highway into the station yard, collided with one of these posts (which was practically invisible owing to the darkening of the street in compliance with the Reduction of Lighting Regulations) and thereby damaged his cab. The post was in the condition in which it was at the time of the passing of the Act of 1902. In an action by the cabdriver against the railway company for damages for negligence:—

Held, that the accident arose, not from any overt act of the company, but from the existence of the gate post, which had been legalized by the Act of 1902, coupled with the diminution of light necessitated by the exigencies of the war; that the mere power to maintain the post imposed no obligation on the company to take reasonable precautions to warn the public of its existence; and that therefore the company was not guilty of negligence.

Manley v. *St. Helens Canal and Ry. Co.* (1858) 2 H. & N. 840 distinguished.

Moore v. *Lambeth Waterworks Co.* (1886) 17 Q. B. D. 462 applied.

Decision of the Court of Appeal reversed.
GREAT CENTRAL RY. CO. *v.* HEWLETT
H. L. (E.) 511

NEUTRAL CARGO - - - - - 77
See PRIZE COURT. 9.

NEWFOUNDLAND—*Governor in Council—Contract — Invalidity — Approval by House of Assembly—Audit Act* (62 & 63 *Vict. c.* 34, *Newfoundland*), *s.* 79.

By rule 278 of the rules and orders for the proceedings of the House of Assembly of Newfoundland, made under s. 4 of the Representation Act, 1892 (Newfoundland), "In all contracts extending over a period of years and creating a public charge, actual or prospective, entered into by the Government, there shall be inserted the condition that the contract shall not be binding until it has been approved by a resolution of the House."

By s. 79 of the Audit Act (62 & 63 Vict. c. 34, Newfoundland) the Governor in Council, subject to conditions therein provided, may remit any duty or toll payable to the Crown imposed by an Act of the Colony.

In 1909 the Governor in Council entered into a contract with the appellants under the great seal of Newfoundland for the extension of a transatlantic cable to Newfoundland and ancillary matters; the contract, which was to continue for twenty-five years, provided for an annual payment by the Government to the appellants and that the appellants should have entry duty free for all cables, instruments, tools, and supplies necessary for carrying it out, but did not contain the provision required by rule 278. The cable was laid and certain other work carried out, but upon a change of the Ministry the new Government repudiated the contract and declined to submit it for legislative sanction. By the letters patent under which the Governor was appointed his powers were to be exercised according to (inter alia) "such laws and ordinances as are or shall be in force in Our said Colony":—

Held, (1.) that rule 278 of the House of Assembly above set out, was binding upon the

NEWFOUNDLAND—*continued.*
Executive as part of the Constitution of Newfoundland; (2.) that the prerogative power of the Governor under the letters patent was subject to the restrictions imposed by the constitutional practice of the Colony; (3.) that the contract accordingly was not binding upon the Government in the absence of the approval of the House of Assembly; (4.) that the power of the Governor in Council under 62 & 63 Vict. c. 34, s. 79, extended only to the remission of duties or tolls in a particular case and not to granting a prospective and continuing exemption. COMMERCIAL CABLE CO. *v.* GOVERNMENT OF NEWFOUNDLAND - - - - J. C. 610

NEW SOUTH WALES.
See AUSTRALIA.

NEW ZEALAND.
See PATENT.

OBSTRUCTION—Highway.
See NEGLIGENCE.

ONTARIO.
See CANADA.

ORDERS IN COUNCIL - - - - 77
See PRIZE COURT. 9.

PASS—Enemy ship - - 112, 193, 198, 199
See PRIZE COURT. 4, 5, 6, 7.

PATENT—*Infringement—Claim to Principle—Duty to claim in Clear Tones—New Zealand Appeal.*
If a patentee desires to claim a general principle, it is his duty to make that claim reasonably clear in the claim as stated in the specification; it must not be left to be inferred from a general review of the specification, or to be spelt out from ambiguous language used therein. RIDD MILKING MACHINE CO. *v.* SIMPLEX MILKING MACHINE CO. - J. C. 550

"PAYMENTS, ALLOWANCES, OR BENEFITS" - - - - - - 162
See WORKMEN'S COMPENSATION. 2.

PERSONAL PROPERTY—Appointment by will—Exercise of general power of appointment - - - - - - - 231
See WILL. 1.

PILOT - - - - - - - 556
See AUSTRALIA. 2.

PORT—Custom of - - - - - - 527
See SHIPPING. 1.

—— Seizure in - - - - 183, 193, 198
See PRIZE COURT. 2, 5, 7.

POWER OF APPOINTMENT (GENERAL)—Exercise by will of - - - 231
See WILL. 1.

PRACTICE.
See PRIZE COURT, 1, 10, and SERVICE OUT OF JURISDICTION.

PREROGATIVE, ROYAL - - - - 77
See PRIZE COURT. 9.

PRINCIPAL AND AGENT - - - 527
See SHIPPING. 1.

PRIVILEGED OCCASION — Association of traders for mutual protection—Communication to members - - 15
See DEFAMATION. 1.

PRIVY COUNCIL APPEALS.
See AUSTRALIA; CANADA; CEYLON; EVIDENCE; NEWFOUNDLAND; PATENT; PRIZE COURT; SPECIFIC PERFORMANCE; and WILL.

PRIZE COURT—*Enemy Ship—Military Hospital-Ship—User for other Purposes—Wireless Telegraphy Apparatus—Messages in Secret Code—Signalling Lights—Destruction of Ship's Papers—Spoliation of Documents—Hague Conference*, 1907, *Convention X., arts.* 1 *and* 8—*Appeal involving Question of Fact only—Practice.*
Art. 8 of Convention X. of the Hague Conference, 1907, provides that the protection to which hospital-ships are entitled under art. 1 ceases if they are used to commit acts harmful to the enemy, but that the presence of wireless telegraphy apparatus on board is not a sufficient reason for withdrawing protection:—
Held, that, without laying down an absolute rule that the mere sending by a hospital-ship of a wireless message in secret code will of itself forfeit her right to protection and subject her to capture and condemnation, it may certainly be laid down that if such messages are sent a clear and satisfactory record of them must be kept, so that when the right of search is exercised there may be reasonable evidence of the messages and of the necessity—if there can be any such necessity on the part of a hospital-ship—for sending them in a secret code.
An appeal from the Prize Court on facts must be treated as a rehearing in the same way as an appeal to the Court of Appeal from a judge sitting without a jury in the High Court. There is jurisdiction to review the findings of the judge, but the Appeal Court attaches great weight to the fact that the judge below has heard the witnesses and practically acts on the opinion of the judge as to the credibility of the witnesses before him and the weight to be attached to their evidence.
Judgment of the Prize Court [1915] P. 129, condemning a German hospital-ship as lawful prize, in that the evidence showed that she was not used for the sole purpose of affording aid to the wounded, sick, and shipwrecked, but was used as a signalling ship for military purposes, affirmed.
Spoliation of documents and the presumptions arising therefrom considered.
THE OPHELIA - - - - J. C. 206

2. —— *Enemy Ship—Outbreak of War—Captured "in port" or "at sea"—Hague Peace Conference*, 1907, *Convention VI., arts.* 1 *and* 2.
Arts. 1 and 2 of Convention VI. of the Second Hague Peace Conference, 1907, relative to the

status of a belligerent merchant ship in an enemy port at the outbreak of hostilities, are applicable only to vessels within a "port" in the ordinary mercantile sense of the word, and have no application to vessels merely within the limits of a fiscal port. THE BELGIA - J. C. 183

3. —— *Enemy Ship—Outbreak of War—Ignorance of Hostilities—Boarding at Sea—Permission to continue Voyage — Entry into Belligerent Port — Detention — Capture — Convention VI. of the Hague Convention of* 1907, *arts.* 1 *and* 2.

A merchant vessel belonging to a belligerent Power which enters an enemy port with knowledge that hostilities have broken out is subject to condemnation, although she has derived that knowledge from an enemy warship which has allowed her to proceed on her voyage.

An Austrian vessel which, after being stopped at sea by a British warship and told of the outbreak of hostilities, was allowed to continue her voyage, entered the port of Suez, apparently in the belief that it would be treated as a neutral port. She was prevented from entering the Canal and was detained. Subsequently she was taken out to sea and conducted to a British warship which seized her as prize :—

Held, reversing the judgment of H.B.M. Supreme Court for Egypt, which had made an order for detention during the war and restoration to the owners at its conclusion, that the vessel must be condemned. THE MARQUIS BACQUEHEM - - - - - J. C. 186

4. —— *Enemy Ship—Outbreak of War—Offer of Pass to Neutral Port—Conditions—Failure to use Pass—Seizure—"Force majeure"—Insufficient Funds—Hague Convention No. VI. of* 1907, *arts.* 1 *and* 2.

An enemy merchant ship is not entitled to receive an unconditional pass under art. 1 of the Hague Convention No. VI. of 1907, and conditions attached to the offer of a pass which are manifestly reasonable do not invalidate it.

The expression "force majeure" in art. 2 has reference to circumstances which render the ship unable to leave the port within the days of grace allowed her, and does not include the circumstance that the owners have not provided the master with sufficient funds to continue the voyage. THE CONCADORO - - J. C. 199

5. —— *Enemy Ship—Use of Egyptian Port—Outbreak of War—Offer of Pass—Remaining in Port—Seizure.* THE ACHAIA - J. C. 198

6. —— *Enemy Ship — Use of Suez Canal Port as Port of Refuge — Permission to leave—No Offer of Pass — Seizure — Status of Port Said—Convention VI. of the Hague Convention of* 1907, *arts.* 1 *and* 2—*Attitude of Germany—Reciprocal Obligations—Detention—Form of Order.*

Art. 1 of Convention VI. of the Hague Convention of 1907 provides that "when a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either

immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to the port of destination or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out." Art. 2 provides that "a merchant-ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the previous article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation."

A German merchant ship arrived at Port Said on August 5, 1914, in ignorance that hostilities had broken out between Great Britain and Germany. From August 5 to August 14 she was not free to leave, but on August 14 she was told that she could go if she liked. She neither asked for, nor was offered, a pass, and remained in port until October 13, when the Egyptian Government took possession of her. On October 16 she was taken out to sea and conducted to a British cruiser, which seized her as prize. These events took place before war was declared between Great Britain and Turkey and before Egypt had been declared a British Protectorate :—

Held, first, that after the outbreak of war between Great Britain and Germany Port Said, as regards Germany, was an enemy port; secondly, assuming that the Convention applied to Egypt and was operative at the time, that the question whether art. 2 or any part of it was obligatory, or whether, if the course referred to as "desirable" in art. 1 were not taken, art. 2 had any application to an enemy vessel which found itself in an enemy port at the outbreak of hostilities, or which subsequently entered without knowledge of the outbreak of hostilities, was a question of law arising on an international document involving a reciprocal obligation performable only at the end of the war.

Held, therefore, that the vessel must be detained until further order, leaving the ultimate rights between the parties to be determined after the war.

Judgment of H. B. M. Supreme Court for Egypt, which had made an order for the detention of the vessel during the war and restoration to her owners at its conclusion, varied, and an order for detention until further order, in the terms of the order in *The Chile* [1914] P. 217, substituted. THE GUTENFELS - J. C. 112

7. —— *Enemy Ship—Use of Suez Canal Port as Port of Refuge—Rejection of Safe Conduct Pass—Seizure—Suez Canal Convention*, 1888, *arts.* 1 *and* 4.

The Suez Canal Convention, 1888, which provides that the Canal shall remain open in time of war as a free passage even to belligerent ships, and that no act of hostility shall be committed in the Canal or its ports of access or within

PRIZE COURT—*continued.*

three miles thereof, has no application to enemy ships which are using one of its ports of access not for the purpose of passage through the Canal, but as a port of refuge in which to seclude themselves in order to defeat belligerents' rights of capture. THE PINDOS. THE HELGOLAND. THE ROSTOCK - - - - - J. C. 193

8. —— *Jurisdiction—Freight—Abandonment of Voyage—Seizure of Cargo—Informal Release.*

The jurisdiction of the Prize Court which attaches upon a capture or seizure in prize and extends to all incidental matters, such as questions of freight, is not terminated by the ship or cargo being handed over to claimants without a formal release by the Court under Order XIII. of the Prize Court Rules.

A British ship which has abandoned a voyage from the United States to Hamburg in consequence of the outbreak of war is not entitled to be awarded by the Prize Court any compensation in lieu of freight in respect of cargo seized at an English port subsequently to the abandonment of the voyage. THE ST. HELENA J. C. 625

9. —— *Powers of King in Council—Royal Prerogative—Extent to which Orders in Council are binding—Inherent Powers of the Court—Preservation of Property in Specie—Neutral Cargo—Contraband—Seizure as Prize—Requisition before Adjudication—Validity—Prize Court Rules, Order XXIX., rr. 1 and 5—Damages—Costs.*

The Crown has no power by Order in Council to prescribe or alter the law which Prize Courts have to administer, even where that law is imperfectly ascertained and defined; but when an Order in Council mitigates the rights of the Crown in favour of enemies or neutrals it is the duty of the Prize Court to act upon it. Further, the Court will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal, and will give the utmost weight to every such Order short of treating it as a binding declaration of law. Thus, an Order declaring a blockade will prima facie justify the condemnation of vessels attempting to enter the blockaded ports, but will not preclude evidence to show that the blockade is ineffective, and therefore unlawful; and an Order authorizing reprisals will be conclusive as to the facts which are cited as showing that a case for reprisals exists, but it will not preclude the right of the Court to hold that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable in all the circumstances of the case.

The dictum of Lord Stowell in *The Fox* (1811) 1 Edw. 312, to the effect that the King in Council possesses legislative rights over a Prize Court analogous to those possessed by Parliament over the Courts of common law, disapproved.

The inherent power of the Prize Court to sell or realize property in its custody pending adjudication is confined to cases in which the preservation of the property is impossible or difficult.

A belligerent Power has by its international law the right to requisition vessels or goods in the custody of its Prize Court, but subject to the following limitations: (*a*) the property must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security; (*b*) there must be a real question to be tried, so that it would be improper to order immediate release; (*c*) the Prize Court must decide judicially whether, under the particular circumstances, the right is exercisable.

In proceedings to which, under the new practice in prize, the Crown, instead of the actual captors, is a party, damages and costs may be awarded against the Crown or the officer who represents the Crown.

A neutral vessel, bound to Stockholm with a contraband cargo (copper) consigned to a Swedish company, was stopped at sea by a British cruiser and taken to a British port. A writ having been issued in prize, a summons was taken out by the Procurator-General on behalf of the War Department to requisition the cargo under Order XXIX. of the Prize Court Rules, as authorized by an Order in Council of April 29, 1915. Rule 1 of Order XXIX. provides that if it is made to appear to the judge that it is desired to requisition property in the custody of the Prize Court in respect of which no final decree of condemnation has been made, he shall, upon an undertaking to pay the appraised value into Court, deliver the property to the Crown. The judge made the order accordingly:—

Held, that Order XXIX., r. 1, construed as an imperative direction to the Court, was not binding; and that, as the judge had no satisfactory evidence before him that the copper was urgently required, the order must be set aside.

Decision of the Prize Court [1916] P. 27 reversed. THE ZAMORA - - - J. C. 77

10. —— *Rehearing — Decree condemning Cargo — Default of Appearance — Practice — Jurisdiction.*

Where substantial injustice would otherwise result, the Prize Court has an inherent power to set aside its own decrees of condemnation so as to let in bona fide claims by parties who have not been heard, and who have not had an opportunity of appearing. This power is discretionary and should not be exercised except where there would be substantial injustice if the decree were allowed to stand, and where the application has been promptly made. THE BOLIVAR - J. C. 203

PRIZE COURT RULES, ORDER XXIX., rr. 1 and 5: THE ZAMORA - - J. C. 77

"PROPERTY WHICH DOES NOT PASS TO THE EXECUTOR AS SUCH" - 231
See WILL. 1.

PUBLICI JURIS—"Cat" mark for gin.
See TRADE MARK.

QUEBEC.
See CANADA.

QUEENSLAND.
See AUSTRALIA.

RAILWAY—Highway.
See BRIDGE and NEGLIGENCE.

RATES—*Exemption from Taxes and Assessments—City of London—General Rate—Consolidated Rate—Police Rate—Exclusion of Exemption—7 Geo.* 3, *c.* 37, *s.* 51—*City of London Sewers Act*, 1848 (11 *&* 12 *Vict. c. clxiii.*), *s.* 169.

Sect. 51 of 7 Geo. 3, c. 37, vests the land reclaimed from the river Thames under the provisions of that Act in the owners of the adjoining lands and wharves "free from all taxes and assessments whatsoever."

The City of London Sewers Act, 1848, which provided for the levying of the sewer rate and the consolidated rate, enacts by s. 169 that every such rate shall be made upon every occupier of any house or building in the City "whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place or otherwise."

The occupiers of certain hereditaments situate in the city of London and forming part of the area reclaimed from the river Thames under 7 Geo. 3, c. 37, were rated to so much of the general rate levied under the City of London (Union of Parishes) Act, 1907, as represented the consolidated rate and the police rate, which was imposed by the City of London Police Act, 1839:—

Held—(1.) (by Viscount Haldane, Lord Parmoor, and Lord Wrenbury; Lord Sumner dissenting), that the exemption granted by 7 Geo. 3, c. 37, though limited by the context to local as distinguished from Imperial taxes, extended to all local taxes and assessments, whether present or future, except so far as any Act imposing a new tax qualified or repealed the exemption; (2.) (by all their Lordships), on the authority of *London Corporation* v. *Netherlands Steamboat Co.* [1906] A. C. 263, that s. 169 of the City of London Sewers Act, 1848, did not impliedly repeal the exemption so far as the consolidated rate was concerned.

Held, therefore (Lord Sumner dissenting), that the occupiers of the reclaimed lands were exempt from liability to the rates in question.

Sion College v. *London Corporation* [1901] 1 K. B. 617, in so far as it decided that the exemption granted by 7 Geo. 3, c. 37, applied only to taxes and assessments in existence at the date of the Act, and others substituted for them, overruled.

Williams v. *Pritchard* (1790) 4 T. R. 2, *Perchard* v. *Heywood* (1800) 8 T. R. 468, and *Rex* v. *London Gas Light and Coke Co.* (1828) 8 B. & C. 54 explained.

Dictum of Bayley J. in *Rex* v. *London Gas Light and Coke Co.*, 8 B. & C. 54, 62, overruled.
ASSOCIATED NEWSPAPERS, LD. *v.* LONDON (CITY) CORPORATION - - H. L. (E.) 429

REAL ESTATE SETTLED ON TRUST FOR SALE - - - - - 231
See WILL. 1.

RECITAL—Agreement—Confirming Act - 542
See CANADA. 4.

RECONVERSION - - - - - - 231
See WILL. 1.

REGISTRATION—Trade mark.
See TRADE MARK.

REHEARING - - - - - - - 203
See PRIZE COURT. 10.

REPUGNANCY—Charterparty—Written words—Printed clause - - - 527
See SHIPPING. 1.

RETURN—Land values - - - - 128
See REVENUE.

REVENUE—*Duties on Land Values—Valuation—Increment Value Duty—Unworked Minerals—Land in Occupation of Tenant—Minerals reserved to Owner—Notice—Form 4—Irregularity—Return made by Owner—Omission in Return to specify Nature of Minerals and Estimate of their Capital Value—Right of Owner to make Separate Return of Minerals—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 23, *sub-ss.* 1, 2, 4; *s.* 26, *sub-ss.* 1 *and* 2.

By s. 23, sub-s. 2, of the Finance (1909-10) Act, 1910, "For the purposes of valuation under this Part of this Act, all minerals shall be treated as a separate parcel of land; but, where the minerals are not comprised in a mining lease or being worked, they shall be treated as having no value as minerals, unless the proprietor of the minerals, in his return furnished to the Commissioners, specifies the nature of the minerals and his estimate of their capital value . . . ." By s. 26, sub-s. 2, the owner of land, on being required by notice from the Commissioners, must furnish to the Commissioners, within the time specified in the notice not being less than thirty days, a return containing such particulars as the Commissioners may require for the purpose of the valuation of the land, and on failure to do so is liable to a penalty not exceeding 50*l.*

The owners of a farm which was let to a tenant, the minerals being reserved to the owners and not comprised in any lease or being worked, received a notice to make a return on Form 4 which accompanied the notice. Form 4 required the owners to furnish particulars of the house and land in the occupation of the tenant, but referred incidentally to the minerals, and under the head of particulars which might be given if desired an inquiry was included as to the nature and estimate of the capital value of any minerals not comprised in a mining lease and not being worked. The notice was invalid inasmuch as it did not give the owners the thirty days allowed by the Act within which to make the return. The owners, however, filled up the form, but did not specify the nature of the minerals or the estimate of their capital value:—

Held, that the copy Form 4 served on the owners was not a proper notice requiring a return of particulars respecting the minerals and did not treat them as a separate parcel of land; that "his return" in s. 23, sub-s. 2, meant

REVENUE—*continued.*

a return in response to a notice under s. 26, sub-s. 2, and that there had been no return with respect to minerals within s. 23, sub-s. 2; and that the owners were entitled to make a return upon a proper form in pursuance of a proper notice and to have a separate provisional valuation of the minerals treated as a separate parcel of land.

Semble: The Commissioners under the Finance (1909-10) Act, 1910, have no power to treat, for the purposes of their inquiries, an unworked and unleased minefield as divided into separate portions corresponding to the subdivisions of the surface and to deal with each of these portions as a separate parcel of land.

Decision of the Court of Appeal [1915] 1 Ch. 703 affirmed. ATT.-GEN. *v.* FORAN **H. L. (E.) 128**

—— Estate duty—Incidence—Personal property — Exercise by will of general power of appointment — "Property which does not pass to the executor as such"—Real estate settled on trust for sale—Reconversion - - - **231**
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"REVERSIBLE" TERMS - - - 527
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REVERSIONARY GRANT — Crown lands — Improvement lease—Extension - **564**
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REVOCATION — Licence — Assignment of premises to which licence was attached —Refusal of assignee to continue licence —Interest in land—Licensee's right of action against licensor - - **54**
See LICENCE.

RIGHT TO SUE.
See ALIEN ENEMY.

ROMAN-DUTCH LAW.
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ROYAL PREROGATIVE - - - - 77
See PRIZE COURT. 9.

RULES OF THE SUPREME COURT, ORDER XI., r. 1 (*g*): JOHN RUSSELL & CO. *v* CAYZER, IRVINE & CO. - **H. L. (E.) 298**

SAFE CONDUCT - - 112, 193, 198, 199
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SCOTLAND - - - - - - 45, 298
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SECRETARY—Company—Authority to bring action on behalf of company - **307**
See ALIEN ENEMY.

SERVICE OUT OF JURISDICTION—*Writ issued in King's Bench Division against Two Defendants both domiciled in Scotland—Acceptance of Service by First Defendant—Service of Concurrent Writ in Scotland on Second Defendant—Rules of the Supreme Court, Order XI., r. 1 (g).*

By Order XI., r. 1 (*g*), service out of the jurisdiction of a writ of summons may be allowed where "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

The plaintiffs shipped goods at Liverpool on a ship owned by a company domiciled in Scotland for carriage to Calcutta. On her arrival at Madras the ship was requisitioned by the Indian Government and the cargo discharged. Thereupon another company domiciled in Scotland, without the knowledge or consent of the cargo owners, loaded the cargo on a ship in which they were interested and which was then bound for Calcutta, and on her way to Calcutta this ship was sunk by an enemy cruiser, and her cargo, including the plaintiffs' goods, was lost. The plaintiffs issued a writ in the King's Bench Division against both companies, claiming damages for breach of contract or duty in the carriage of goods by sea and for trespass and wrongful conversion of the goods. The writ was marked "Not for service out of the jurisdiction." The first defendants consented to the jurisdiction, and their London solicitors accepted service on their behalf. The plaintiffs then, by leave of the Court under Order XI., r. 1 (*g*), issued a concurrent writ and served it on the second defendants in Scotland. These defendants, after entering a conditional appearance, applied to have the concurrent writ and the service thereof set aside:—

Held, that the consent of the first defendants to the jurisdiction could not affect the rights of third parties, and that the action was not "properly brought" against the first defendants within the meaning of Order XI., r. 1 (*g*), and therefore the concurrent writ and the service thereof ought to be set aside.

Decision of the Court of Appeal affirmed. JOHN RUSSELL & CO. *v.* CAYZER, IRVINE & CO. - - - - - - - **H. L. (E.) 298**

SHAREHOLDERS—Enemy.
See ALIEN ENEMY.

SHIPPING — *Charterparty — Demurrage — Written Words introduced into Printed Clause —Repugnancy—Reference to Custom of Port as modifying Stipulation as to Rate of Discharge—Despatch Money—Effect on Charterparty framed in "reversible" Terms—Principal and Agent—Authority—Estoppel.*

A charterparty provided that a cargo of pit props was "to be loaded *at the rate of* 125 *fathoms daily* and discharged *at the rate of* 125 *fathoms daily reversible* with customary steamship despatch, as fast as the steamer can receive and deliver, during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted." The words in italics were

SHIPPING—*continued.*

interlined in writing; the rest of the clause was printed. "Reversible" signified that any time saved in loading might be added to the time allowed for discharging and vice versa. The daily rate was equivalent to thirteen days for loading and thirteen days for discharging.

When the ship arrived at the port of loading the master of the ship entered into an agreement with the shipper (who was also the vendor) of the cargo that an allowance for "despatch money" should be made to the shipper for each day saved in loading. The ship was loaded in nine days, and accordingly despatch money for four days was deducted from the freight. In respect of this purchase of four days by the master the bill of lading contained the statement "thirteen days used for loading." This bill was indorsed to the charterers, and they in knowledge of the transaction between the master and the shipper took delivery of the cargo under the bill. The ship took 17½ days in discharging the cargo, allowing for Sundays and holidays. By the custom of the port of discharge the discharge of pit props was suspended during wet weather and during half of each Saturday, and if the custom of the port applied the ship was discharged in thirteen days. In an action for demurrage incurred in the discharge of the cargo:—

Held, (1.) (affirming the decision of the Second Division of the Court of Session in Scotland), on the principle of *Postlethwaite* v. *Freeland* (1880) 5 App. Cas. 599 and *Hulthen* v. *Stewart & Co.* [1903] A. C. 389, that the parties intended to contract on the basis of a fixed number of lay days and that the reference to the custom of the port was inconsistent with that intention, and consequently that the time during which the weather was wet and the half of each Saturday could not be deducted; (2.) (reversing the decision of the Second Division) that the shipper had no authority from the charterers to alter the charterparty by selling the four days saved in the loading to the ship, and that the charterers were not estopped by the false statement in the bill of lading from claiming on the discharge under the word "reversible" the four days saved in the loading; that consequently they were liable for demurrage for one half-day only.

Interlocutor of the Second Division of the Court of Session in Scotland, 1916 S. C. 223, discharged. LOVE AND STEWART, LD. *v.* ROWTOR STEAMSHIP CO. - **H. L. (Sc.) 527**

2. —— *Charterparty—Requisition by Admiralty—Tank Steamship—Time Charterparty—Employment for Carriage of Oil as Charterers should direct—Liberty to sub-let on Admiralty or other Service—Employment for Transport of Troops—Restraint of Princes—Frustration of Adventure—Termination or Suspension of Charterparty.*

By a time charterparty a tank steamship was chartered for sixty months to be employed in such lawful trades for voyages between any safe ports within certain limits for the carriage of oil as the charterers or their agents should direct. The charterers were to pay for the use and hire

SHIPPING—*continued.*

of the vessel a fixed sum per month. The charterparty contained an exception (inter alia) of arrests and restraints of princes, and the charterers had the liberty of sub-letting the steamer on Admiralty or other service. After the outbreak of the war, when the charterparty had nearly three years to run, the steamer was requisitioned by the Admiralty, and after the necessary alterations was employed by them in the transport of troops. The owners contended that the charterparty had been determined by the requisition. The charterers, who were willing to continue the agreed freight, contended that the charterparty was still subsisting:—

Held by Lord Buckmaster L.C., Earl Loreburn, and Lord Parker of Waddington (Viscount Haldane and Lord Atkinson dissenting), that the interruption was not of such a character as that the Court ought to imply a condition that the parties should be excused from further performance of the contract, and that the requisition did not determine or suspend the contract.

Decision of the Court of Appeal [1916] 1 K. B. 485 affirmed. TAMPLIN (F. A.) STEAMSHIP CO. *v.* ANGLO-MEXICAN PETROLEUM PRODUCTS CO. - - - - **H. L. (E.) 397**

—— Compulsory pilotage - - - - **556**
See AUSTRALIA. 2.

—— Prize Court.
See PRIZE COURT.

SIMILARITY OF DEVICE.
See TRADE MARK.

SLANDER - - - - - - - **481**
See DEFAMATION. 2.

SPECIAL DAMAGE - - - - - **481**
See DEFAMATION. 2.

SPECIFIC PERFORMANCE—*Vendor and Purchaser—Time of Essence—Purchaser in Default—Undischarged Mortgage—Vendor able to convey—Ontario, Appeal from.*

Under an agreement for the sale of land in Ontario time was made of the essence: the purchaser being in default at the date fixed for completion, the vendor cancelled the agreement. At that date there was a small mortgage upon the land. The mortgagee had consented (but was not bound) to accept repayment upon the completion taking place; the purchaser had been informed that the mortgage would be paid off upon the completion and had raised no objection:—

Held, that the vendor was able and willing to convey at the date fixed for completion, and that the purchaser being in default was not entitled to specific performance. BRICKLES *v.* SNELL - - - - - - **J. C. 599**

SPECIFICATION.
See PATENT.

STANDARD OF MAINTENANCE—Highway—Bridge over railway—Increase of traffic
See BRIDGE. **356**

STATUTE—Illustrations to.
See EVIDENCE.

STATUTES :—

I. IMPERIAL STATUTES.

1845.

8 & 9 Vict. c. 20 (Railways Clauses), s. 46 : ATT.-GEN. *v.* GREAT NORTHERN RY. CO. - - - - **H. L. (E.) 356**

1867.

30 Vict. c. 3 (British North America), s. 125 : SMITH *v.* VERMILLION HILLS RURAL MUNICIPALITY COUNCIL - **J. C. 569**

—— ——, s. 91, sub-s. 29 ; s. 92, sub-s. 10 (*a*) : HAMILTON, GRIMSBY, AND BEAMSVILLE RY. CO. *v.* ATT.-GEN. FOR ONTARIO - - - - **J. C. 583**

1889.

52 & 53 Vict. c. 63 (Interpretation), s. 32, sub-s. 3 : ATT.-GEN. *v.* DERBYSHIRE C. C. - - - - **H. L. (E.) 283**

1893.

56 & 57 Vict. c. 68 (Isolation Hospitals), ss. 9, 10, 20 : ATT.-GEN. *v.* DERBYSHIRE C. C. - . - - **H. L. (E.) 283**

1894.

57 & 58 Vict. c. 30 (Finance), s. 9, sub-s. 1 : O'GRADY *v.* WILMOT - **H. L. (E.) 231**

1905.

5 Edw. 7, c. 16 (Trade Marks), ss. 11, 19, 40 : BOORD & SON (INCORPORATED) *v.* BAGOTS, HUTTON & CO. - **H. L. (E.) 382**

1906.

6 Edw. 7, c. 58 (Workmen's Compensation), s. 1, sub-s. 1 : GLASGOW COAL CO. *v.* WELSH - - - - **H. L. (Sc.) 1**

—— ——, s. 9, Sched. I., par. 3 : CONSIDINE *v.* MCINERNEY - - **H. L. (I.) 162**

1910.

10 Edw. 7, c. 8 (Finance), s. 23, sub-ss. 2, 4 ; s. 26, sub-ss. 1, 2 : ATT.-GEN. *v.* FORAN, **H. L. (E.) 128**

1912.

2 Geo. 5, c. 2 (Coal Mines (Minimum Wage)), s. 1, sub-s. 1 : HOOLEY *v.* BUTTERLEY CO. - - - - **H. L. (E.) 63**

1914.

4 & 5 Geo. 5, c. 78 (Courts (Emergency Powers)), s. 1, sub-s. 1 (*b*) : FOSTER *v.* BARNARD - - - **H. L. (E.) 154**

II. LOCAL AND PERSONAL (ENGLAND).

1767.

7 Geo. 3, c. 37, s. 51 : ASSOCIATED NEWSPAPERS, LD. *v.* LONDON (CITY) CORPORATION - - - **H. L. (E.) 429**

STATUTES—*continued.*

1848.

11 & 12 Vict. c. clxiii. (City of London Sewers): ASSOCIATED NEWSPAPERS, LD. *v.* LONDON (CITY) CORPORATION **H. L. (E.) 429**

1902.

2 Edw. 7, c. cxxxv. (Great Central Railway), s. 31 : GREAT CENTRAL RY. CO. *v.* HEWLETT - - - **H. L. (E.) 511**

III. IRELAND.

1896.

59 & 60 Vict. c. 47 (Land Law (Ireland)), s. 31 : ATT.-GEN. FOR IRELAND *v.* PROBY **H. L. (I.) 468**

1903.

3 Edw. 7, c. 37 (Irish Land), s. 98, sub-s. 2 : ATT.-GEN. FOR IRELAND *v.* PROBY **H. L. (I.) 468**

IV. SCOTLAND.

1878.

41 & 42 Vict. c. 51 (Roads and Bridges (Scotland)), ss. 3, 94, 123 ; Sched. C., s. 105 : EVANS *v.* EDINBURGH CORPORATION **H. L. (Sc.) 45**

1879.

42 & 43 Vict. c. cxxxii. (Edinburgh Municipal and Police), s. 151 ; EVANS *v.* EDINBURGH CORPORATION - **H. L. (Sc.) 45**

V. COLONIAL STATUTES.

Australia.

1878.

41 Vict. No. 3, Queensland (Navigation), s. 113 : FOWLES *v.* EASTERN AND AUSTRALIAN STEAMSHIP CO. **J. C. 556**

1895.

58 Vict. No. 18, N. S. W. (Crown Lands), ss. 26, 44 : BULL *v.* ATT.-GEN. FOR NEW SOUTH WALES - - **J. C. 564**

Canada.

1887.

Street Railway Act (R. S. Ont., 1887, c. 171), s. 18 : TORONTO CORPORATION *v.* TORONTO RY. CO. - - **J. C. 542**

1910.

Married Women's Relief Act (Alberta, 1910, ch. 18), ss. 2, 8, 10 : DREWRY *v.* DREWRY - - - - **J. C. 631**

1913.

3 & 4 Geo. 5, c. 43 (Municipal Act, Ont.), s. 321 (*b*) ; s. 325, sub-s. 1 : TORONTO (CITY) CORPORATION *v.* TORONTO CONSUMERS' GAS CO. - - **J. C. 618**

Ceylon.

Ordinance 15 of 1876 : DE SOYSA (JAMES) *v.* DE SOYSA (MARIA) - - **J. C. 593**

STATUTES—*continued.*

Newfoundland.

62 & 63 Vict. c. 34 (Audit), s. 79: COMMERCIAL CABLE CO. *v.* NEWFOUNDLAND GOVERNMENT - - - J. C. 610

Straits Settlements.

Ordinance III. of 1893, s. 32, sub-s. 5, and Illustration (*l*): MAHOMED SYEDOL ARIFFIN *v.* YEOH OOI GARK J. C. 575

STOCK EXCHANGE - - - - - 154
See EMERGENCY LEGISLATION.

STRAITS SETTLEMENTS.
See EVIDENCE.

SUEZ CANAL CONVENTION, 1888, arts. 1, 4: THE PINDOS - - - J. C. 193

SUEZ CANAL PORT—Use of, as port of refuge
See PRIZE COURT. 6, 7. 112, 193

SUPERANNUATION - - - - 162
See WORKMEN'S COMPENSATION. 2.

TAXATION, LOCAL—Exemption - 429, 588
See CANADA, 5, and RATES.

TESTAMENTARY EXPENSES—Direction to pay - - - - - - - 231
See WILL. 1.

TIME OF ESSENCE.
See SPECIFIC PERFORMANCE.

TRADE MARK—*Registration—Similarity of Device—"Calculated to deceive"—"Cat" Mark for Gin—Publici Juris—Trade Marks Act*, 1905 (5 *Edw. 7, c.* 15), *ss.* 11, 19, 40.

An application to register in class 43 for gin a trade mark consisting of a pictorial label, of which the prominent feature was the representation of a cat in a sitting posture got up as a puss in boots, was opposed by the registered proprietors of an old trade mark for gin, consisting of the device of a cat standing on a barrel, on the ground that under this trade mark in the Eastern markets, where the opponents had acquired a great reputation, their goods had become known as "Cat" goods, and that the registration must cause confusion. The device of a cat per se had become publici juris in this country in connection with gin, and the applicants disclaimed any right to the exclusive use thereof:—

Held, that the applicants' mark was not calculated to deceive, there being no resemblance between the two marks, and that the mere possibility of confusion arising from the insufficient description of the opponents' mark by ignorant people in foreign markets was not a ground for refusing registration.

Decision of the Court of Appeal [1916] 2 Ch. 103 affirmed. BOORD & SON (INCORPORATED) *v.* BAGOTS, HUTTON & CO. - H. L. (E.) 382

TRADING WITH THE ENEMY.
See ALIEN ENEMY.

TRAFFIC—Increase of—Highway—Bridge over railway—Standard of maintenance 356
See BRIDGE.

TRUST FOR SALE—Real estate settled on 231
See WILL. 1.

VALUATION—Revenue—Land values - 128
See REVENUE.

VENDOR AND PURCHASER.
See SPECIFIC PERFORMANCE.

VESTING—Executory gift—Period of distribution—Defeasance - - - 121
See WILL. 2.

WAR—Outbreak of.
See PRIZE COURT.

WILL—*Death Duties—Estate Duty—Incidence—Personal Property—Exercise by Will of General Power of Appointment—"Property which does not pass to the executor as such"—Real Estate settled on Trust for Sale—Reconversion—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

Personal property appointed by will in exercise of a general power of appointment is "property which does not pass to the executor as such" within the meaning of s. 9, sub-s. 1, of the Finance Act, 1894, and consequently the estate duty payable in respect thereof is a first charge on the property.

In re Hadley [1909] 1 Ch. 20; *In re Moore* [1901] 1 Ch. 691; *In re Dixon* [1902] 1 Ch. 248; *In re Fearnsides* [1903] 1 Ch. 250; and *In re Orlebar* [1908] 1 Ch. 136 overruled.

In re Treasure [1900] 2 Ch. 648; *In re Maddock* [1901] 2 Ch. 372; *In re Power* [1901] 2 Ch. 659; and *In re Dodson* [1907] 1 Ch. 284 followed on this point.

The estate duty payable in respect of such property is not included in a direction to pay testamentary expenses.

In re Treasure [1900] 2 Ch. 648 overruled on this point.

Testatrix, in the exercise of a general power of appointment over the proceeds of sale of real estate which was settled by her marriage settlement upon trust for sale at her request during her life, and after her death at the discretion of the trustees, by her will appointed that the trustees of the settlement should stand possessed of "the hereditaments, property, money, stocks, funds and securities" which should be subject to the trusts of the settlement upon trust to "convey assign transfer and pay" the same to the trustees of the will; and she thereby appointed the same to the trustees of the will upon trust for sale and conversion and to pay the income to her husband for life, and after his death to hold the same upon certain other trusts; and she gave her residuary estate, subject to the payment of her funeral and testamentary expenses and debts and legacies, to her husband, whom she appointed her executor. She also directed that the appointed property should not be sold during the lifetime of her husband without his consent. The real estate in question remained unsold at the date of the death of the testatrix;—

Held, (1.), distinguishing *In re Lord Grimthorpe* [1908] 2 Ch. 675, that the will did not

WILL—*continued.*

operate as a reconversion of the appointed property and that the property passed on the death of the testatrix as personalty; and by Lord Buckmaster L.C., Lord Atkinson, and Lord Sumner, Lord Parmoor dissenting, (2.) that the estate duty payable in respect thereof was a first charge on the property; (3.) that such estate duty was not thrown upon the residue by the direction for payment of the testamentary expenses.

Decision of the Court of Appeal [1915] 1 Ch. 613 reversed. O'GRADY *v.* WILMOT
H. L. (E.) 231

2. —— *Vesting—Executory Gift—Period of Distribution — Defeasance — Appeal from Jamaica.*

A testator by clause 7 of his will directed that the trustees therein named should stand possessed of his residuary estate in trust to pay out of the income certain annuities to his wife and children, and that immediately after the decease of his wife they should stand possessed thereof in trust for all his said children in certain proportions. Clause 8 provided as follows: "if any child shall die in my lifetime or after my decease leaving a child or children who shall survive me then and in every such case such last mentioned child or children shall take, and if more than one equally between them, the share which his or her or their parent would have taken of and in the residuary trust funds if such parent had survived me":—

Held, that the provided shares of the residuary estate vested in the children of the testator from his death, but that in the event of the death of any child before the death of the testator's widow, which was the contemplated period of distribution, the vesting of that child's share was subject to defeasance in favour of his or her child or children. WARD *v.* BROWN - **J. C. 121**

WORDS:—

—— "Calculated to deceive": BOORD & SON (INCORPORATED) *v.* BAGOTS, HUTTON & CO. - - - **H. L. (E.) 382**

—— "Force majeure": THE CONCADORO
J. C. 199

—— "Land": TORONTO (CITY) CORPORATION *v.* TORONTO CONSUMERS' GAS CO.
J. C. 618
SMITH *v.* VERMILLION HILLS RURAL MUNICIPALITY - - - **J. C. 569**

—— "Mortgagee in possession": FOSTER *v.* BARNARD - - - - - - **154**

—— "Payments, allowances, or benefits": CONSIDINE *v.* MCINERNEY
H. L. (I.) 162

—— "Properly brought" (Action): RUSSELL (JOHN) & CO. *v.* CAYZER, IRVINE & CO.
H. L. (E.) 298

—— "Property which does not pass to the executor as such": O'GRADY *v.* WILMOT - - - - **H. L. (E.) 231**

—— "Reversible": LOVE AND STEWART, LD. *v.* ROWTOR STEAMSHIP CO.
H. L. (Sc.) 527

WORDS—*continued.*

—— "Superior interest": ATT.-GEN. FOR IRELAND *v.* PROBY - **H. L. (I.) 468**

WORKMEN'S COMPENSATION—"*Accident*"—*Miner baling out Water—Rheumatism caused by exceptional Exposure to Cold and Damp—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A man employed as a brusher in a mine was directed by the mine owners to bale out a large quantity of water which had accumulated at the pit's bottom owing to the breakdown of a pump which had occurred five days earlier. He was engaged in this work, which necessitated his standing up to his chest in water for eight hours, with the result that he contracted sub-acute rheumatism. Upon a claim for compensation under the Workmen's Compensation Act, 1906, the arbitrator found that the rheumatism was caused by the extreme and exceptional exposure to cold and damp to which the man was subjected on the occasion in question and awarded him compensation:—

Held, that the injury was sustained by accident within the meaning of the Act.

Decision of the Second Division of the Court of Session in Scotland, 1915 S. C. 1020, affirmed. GLASGOW COAL CO. *v.* WELSH - **H. L. (Sc.) 1**

2. —— *Compensation — Amount of Weekly Payment—"Payments, allowances, or benefits"—Civil Servant—Superannuation Allowance and Gratuity under Superannuation Acts*, 1834–1909—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 9; *Sched. I., par.* 3.

An attendant at a lunatic asylum employed subject to the regulations of the Civil Service Commissioners was permanently incapacitated by an injury sustained by accident arising out of and in the course of his employment and was retired in consequence of his incapacity. He was then aged forty-eight and had been in his employment for twenty years. Under the Superannuation Acts, 1834–1909, he was entitled to expect on retirement at the age of sixty, or before that age in the case of bodily or mental infirmity, a superannuation allowance and a lump sum by way of gratuity calculated on the basis of the number of years which he had served, but he had no legal right to these payments, and on his retirement he duly received a superannuation allowance and gratuity from the asylum authorities. Upon a claim for compensation under the Workmen's Compensation Act, 1906:—

Held, that the superannuation allowance and gratuity were payments, allowances, or benefits within par. 3 of Sched. I. to which regard should be had in fixing the amount of the weekly compensation.

Decision of the Court of Appeal in Ireland [1916] 2 I. R. 193 reversed. CONSIDINE *v.* MCINERNEY - - - - **H. L. (I.) 162**

WRIT—Service out of jurisdiction.
See SERVICE OUT OF JURISDICTION.

WRITTEN WORDS—Printed clause—Charter-party - - - - - - **527**
See SHIPPING. 1.

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